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### Choosing Judges the Democratic Way

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## CHOOSING JUDGES THE DEMOCRATIC WAY

LARRY W. YACKLE\*

A generation ago, the pressing question in constitutional law was the countermajoritarian difficulty.<sup>1</sup> Americans insisted their government was a democratic republic and took that to mean rule by a majority of elected representatives in various offices and bodies, federal and local. Yet courts whose members had not won election presumed to override the actions of executive and legislative officers who had. The conventional answer to this apparent paradox was the Constitution, which arguably owed its existence to the people directly. Judicial review was justified, accordingly, when court decisions were rooted firmly in the particular text, structure, or historical backdrop of the Constitution. Courts' nonmajoritarian power was otherwise unexplained and unexplainable. Today, we are smarter, if not wiser. We, or most of us,<sup>2</sup> have abandoned false hopes that the Constitution can be squared with majoritarianism and that appeals to literal text, inferences from structure, or "original intent" can offer neat answers to the countermajoritarian riddle.<sup>3</sup> More important, we have rejected the notion that majorita-

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\* Professor of Law, Boston University. I would like to thank Kathryn Abrams, Jack Beermann, Clark M. Byse, Michael J. Churgin, Stanley Z. Fisher, Ira C. Lupu, Lawrence G. Sager, and Aviam Soifer for valuable comments on an earlier draft. I also want to acknowledge help from the Faculty Workshop at Boston University. James G. Newman and Suzanne S. Taylor helped with research.

<sup>1</sup> A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) (arguing that judicial review is countermajoritarian in that it constitutes "control by an unrepresentative minority of an elected majority").

<sup>2</sup> *But see* Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *SAN DIEGO L. REV.* 823, 824-26 (1986) (arguing that judges must interpret the Constitution's words according to the intentions of those who drafted, proposed, and ratified it). The magnitude of Judge Robert Bork's departure from the main channel of constitutional law scholarship, as well as the direction of that departure, may have incited the controversy surrounding his nomination for a position on the Supreme Court. *See* *Boston Globe*, Oct. 24, 1987, at 1, col. 3 (reporting Bork's 58-42 defeat on the Senate floor); *see also* *The Bork Nomination*, 9 *CARDOZO L. REV.* 1 (1987) (collecting discussions of Judge Bork's record). I do not mean in this essay to build a case for or against the Reagan Administration's ill-fated attempt to seat Judge Bork. But I acknowledge that what I have to say may have implications for the manner in which the Senate, and indeed the country, responded to his nomination.

<sup>3</sup> No one contends, for example, that the president's authority to nominate and the Senate's ability to veto candidates for the federal bench justify a judicial override of executive and legislative decisions. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 *N.Y.U. L. REV.* 278, 329 (1979) (conceding that the joint power of the president and Senate to make appointments to the Court does

rianism is an unqualified good and now appreciate more fully the importance of restraints on majoritarian power. The first check is republicanism, which proves to be both a practical necessity in a populous nation and a device for filtering individual and group preferences.<sup>4</sup> Raw majoritarianism, which chooses policies by a barren show of hands, may sacrifice the interests of the politically disadvantaged. By contrast, representative bodies can attend to all citizens' interests—fashioning public policies to the common good. This check is insufficient in operation, however. The representative process tends to degenerate into a bewildering political marketplace dominated by factions about which Madison warned the nation in her crib.<sup>5</sup> Effective political accountability is owed primarily to the diligent, the organized, the historically dominant, and the well-heeled.<sup>6</sup>

A further check on majoritarianism is therefore required—to be supplied by judges enforcing the Constitution. By the sights of mainstream scholarship today, majority support alone is an insufficient basis for upholding governmental action. Rather, the measure under examination must serve some legitimate governmental objective—an objective which takes account

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not dissolve the tension between noninterpretive review and the principle of electorally accountable policymaking). Nor is Congress's power over the judicial budget or the possibility of impeachment sufficient to resolve the countermajoritarian dilemma. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 49-52 (1980). Both Black and Perry have announced their reliance on Congress's power to restrict the federal courts' jurisdiction as a means of resolving the countermajoritarian tension. See C. BLACK, *DECISION ACCORDING TO LAW* 17-19 (1981); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 128-39 (1982). Yet that explanation for judicial review is perhaps the most dissatisfying of all. Sager, *What's a Nice Court Like You Doing in a Democracy Like This?*, 36 *STAN. L. REV.* 1087, 1101-05 (1984) (arguing that congressional power to regulate jurisdiction is limited and that stripping the federal courts of power would undermine the legal system). Bruce Ackerman tries to maintain fealty to majoritarianism by understanding constitutionalism as the reflection of intertemporal conflicts in majoritarian preferences. Courts, in his view, are justified in invalidating current legislative decisions in order to vindicate prior majoritarian choices, made in periods of constitutional politics, which rightly override policies fashioned on a daily basis. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1049-51 (1984). See also Seidman, *Ambivalence and Accountability*, 61 *S. CAL. L. REV.* 1571 (1988) (attempting to justify judicial review as the enforcement of a constitutional "Ulysses contract" by which a majority binds itself to "metapreferences" expressed earlier).

<sup>4</sup> See *infra* Part III (discussing Sunstein's exploration of the republican character of American government).

<sup>5</sup> THE FEDERALIST NO. 10 (J. Madison).

<sup>6</sup> The point is overstated in the text, but I credit the implication, flowing from both the pluralist and public choice literature, that there is wisdom in Bismarck's epigram: If you like sausages and law, don't go where they're made. See *infra* notes 74 and 76 (citing pluralist and public choice literature).

of the interests of all citizens. When the representative process falters, and majorities reach results that disparage political losers out of hostility, courts are empowered to call a halt. It may seem that judicial review is in this sense consistent with majority rule and can be justified as a means of perfecting majoritarian processes.<sup>7</sup> Yet in performing their constitutional function courts do not enforce ideas that enjoy majority support; they insist upon independent principle.<sup>8</sup> Judges call upon majorities to respect the integrity of all citizens. That mandate needs no majoritarian endorsement and, indeed, holds its own ground in the teeth of majoritarian sentiment.<sup>9</sup> This system—contemplating ordinary policymaking by representative bodies subject to judicial review to ensure that all citizens' interests are respected—earns a splendid appellation: American constitutional democracy. The label fits, not because the preferences of rank-and-file citizens are translated into public policy by majoritarian means, and not because courts force elected officers to adhere to majoritarian preferences, but because all Americans can safely look both to their republican representatives and to their courts to ensure that they are remembered in the councils of government.

The vital function assigned to courts in this constitutional democracy demands that judges who staff those courts themselves be selected constitutionally. This is the terrain I mean to explore. My point of departure is the unremarkable proposition that the Constitution has something to say about choosing both federal and state judges. Various provisions of the Constitution and its interpretive culture plainly bear upon judicial selection. Still, constitutional standards are typically disclaimed in this context, and the selection of judges is left to politics restrained only by vague conventions of recent origin.<sup>10</sup> A principal part of my project, then, is to investigate our palpable distrust of constitutional standards for the selection of judges. Another is to identify those standards.

Part I meets the contention that the Constitution relegates judicial selection solely to politics. With respect to federal judges, the constitutional text

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<sup>7</sup> Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 456-71 (1978).

<sup>8</sup> Thus Ronald Dworkin has distinguished between claims that are acknowledged because they are embraced by a majority and claims that rest upon individual rights apart from majority preferences. R. DWORKIN, *LAW'S EMPIRE* 376-77 (1986) [hereinafter *LAW'S EMPIRE*]; accord R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-100 (1977).

<sup>9</sup> This is Larry Sager's chief criticism of Ely. Sager, *The Incurable Constitution* 10 (unpublished manuscript) (on file at the offices of the Boston University Law Review) (contending that "[n]otions of liberty, equality, and fair dealing pervade our constitutional tradition as core themes, not incidental diversions from a majoritarian project").

<sup>10</sup> I have in mind here recurring suggestions that the selection of judges should be an exercise in antiseptic appraisal of candidates' "qualifications" apart from politics. See *infra* Part IV(B).

and fair inferences from it establish only that the president and the Senate may pursue political objectives in naming candidates to the bench. The text does not proclaim that politics supplies the sole basis of choice to the exclusion of all else. Quite the contrary, the appointments clause only structures the way in which both political concerns and independent constitutional standards are brought to bear on judicial appointments. And with regard to state judges, ordinary constitutional analysis, derived primarily from the fourteenth amendment, is fully applicable to judicial selection just as it is to other faces of state action. Part II examines the recurrent suspicion that no manageable constitutional standards can be identified and anticipates the contention that, were standards available, they would necessarily entail choosing judges by popular election. Both concerns prove to be illusory. Part III offers a severely truncated survey of current constitutional thinking and distills from it principles that I later invoke to define constitutional standards suitable for judicial selection.

Part IV, the body of the essay, identifies standards for choosing judges and pursues the implications of invoking those standards. First, I contend that in state regimes in which judges are *elected*, well-settled constitutional standards for the conduct of elections are fully applicable and that in state and federal systems in which judges are *appointed*, related standards, borrowed from the law of "affirmative action," are equally applicable by analogy. Put bluntly, the Constitution mandates that members of constitutionally significant out-groups are included in the pool from which judges are taken. Second, I identify judicial selection criteria typically mentioned in the literature and consider in each instance whether the Constitution, properly understood, permits decisionmakers to invoke those criteria in choosing candidates to be elevated to the bench. In some instances, common understandings are perfectly consistent with the Constitution; in others, criteria conventionally thought to be appropriate are constitutionally objectionable. Finally, Part V discusses appropriate implementation machinery. I set to one side the possibility that judicial selection standards may be enforced through ordinary litigation in the courts and focus upon the duty of executive and legislative authorities to respect constitutional standards governing their participation in the judicial selection process.

### I. JUDICIAL SELECTION AND PERMISSIBLE POLITICS

The first barrier to the recognition of constitutional standards applicable to the selection of judges is the prevailing tendency to read the Constitution to assign judicial selection to the political arena.<sup>11</sup> Thus it is said that within the

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<sup>11</sup> This is to invoke a cousin of the much-noticed but little-applied "political question" doctrine, which has it that courts must keep their own counsel with respect to constitutional issues demonstrably assigned by the Constitution to a coordinate political department. See *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); see also

federal system the appointments clause leaves both the nomination of candidates by the president and their acceptance by the Senate to the political predilections of the elected officials concerned—in one of two mutually exclusive ways. Either the selection of judges is a matter of executive prerogative such that the president's political judgment should prevail, in which case the Senate's role is drastically limited,<sup>12</sup> or the selection of judges is thoroughly political in every sense, in which case both the president and the Senate are free to pursue their own political agenda to the exclusion of any and all other concerns.<sup>13</sup> By either account, invoking the Constitution with respect to the appointment of judges renders no legal standards to guide decisionmakers. While the Civil War amendments are plainly applicable to the selection of state judges, it is widely believed that there too the forces operating within a state's political framework will be paramount.<sup>14</sup>

The tools for these arguments in the federal system are familiar. The appointments clause expressly refers only to "Judges of the supreme Court" and as to them assigns to the president the authority to "nominate" candi-

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Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599-601 (1976). In the judicial selection context, the point is not that the Constitution assigns the enforcement of standards to other branches but that the Constitution establishes no standards at all—save the political preferences of office-holders elsewhere in the government.

<sup>12</sup> See, e.g., Humphrey, *Plainly The Man for the Job*, N.Y. Times, July 13, 1987, at A17, col. 1 (insisting that because Ronald Reagan won the presidential election of 1984 he was entitled to name a person who shared his "conservative judicial philosophy"—Judge Bork—to the Supreme Court). President Nixon's statement in connection with the Carswell nomination may be the classic illustration of the argument for presidential prerogative:

What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court—and whether this responsibility can be frustrated by those (in the Senate) who wish to substitute their own philosophy or their own subjective judgement for that of the one person entrusted by the Constitution with the power of appointment.

H. BALL, *COURTS AND POLITICS: THE FEDERAL JUDICIAL SYSTEM* 183 (2d ed. 1987) (quoting a letter from Richard Nixon to Senator William Saxbe, March 31, 1970). Compare N. MCFEELEY, *APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY* 138-39 (1987) (recalling that Lyndon Johnson named "Great Society liberals" to the federal bench in order to shape the judiciary through his nominations) with Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987) (reporting that President Reagan nominated only conservatives).

<sup>13</sup> See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* ix, 108, 111 (1985) (describing and defending political machinations on both sides of the appointment struggle).

<sup>14</sup> See P. JOHNSON, *THE COURT ON TRIAL: THE CALIFORNIA JUDICIAL ELECTION OF 1986*, at 2-5 (1985) (published by The Supreme Court Project and The Foundation for Research in Economics and Education) (describing expectations that Republican and Democratic governors in California would name different candidates to the state bench and advocating that citizens take politics into account in retention elections).

dates and to the Senate the responsibility to offer "Advice and Consent."<sup>15</sup> By common account, this division of labor reflects structural themes much in evidence in the Convention debates.<sup>16</sup> On one level, the appointments clause incorporates "separation of powers" and "checks and balances." Governmental power at the national level is distributed among three "separate" branches—legislative, executive, and judicial—in order to prevent the concentration of authority in any one. At the same time, the spheres of influence occupied by the separate branches are not insular: each branch is granted express authorities with respect to the business of the other two in order to check their excesses.<sup>17</sup> In this instance, the ability to place candidates on the Supreme Court is shared by the president and the Senate in a fashion that both recognizes the independent responsibilities of the executive and legislative branches and ensures that neither can upset the constitutional equipoise by appropriating the Court.

On a second level, the reservation of judicial selection to the president and the Senate, to the exclusion of the House of Representatives, reflects yet another historical balance—between confederation and popular democracy. Madison initially proposed that the Senate rather than the House or the full Congress should appoint the justices of the Supreme Court.<sup>18</sup> At that time, he was apparently convinced that such appointments should be made by a legislative unit but thought that the smaller body was better suited to identify qualified candidates and less likely to choose justices on the basis of friendship or talents for legislative, rather than judicial, service.<sup>19</sup> By the time a version of his scheme was adopted, however, the Convention had agreed that the Senate's membership would be apportioned by states rather than population. The Senate's role in choosing justices thus became a vehicle for the states as entities to exercise influence on the distribution of power. At that later point, there was reason to force the Senate to share authority for judicial appointments with the president, a nationally elected officer.<sup>20</sup>

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<sup>15</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>16</sup> It is dangerous business to draw significant inferences from what little we know of the Convention debates or, for that matter, any historical materials. I do not refer to the documentary record behind the appointments clause to make or to underscore major points. The paragraph in the text reflects conventional wisdom.

<sup>17</sup> See Feld, *Separation of Powers: Boundaries or Balance?*, 21 GA. L. REV. 171 (1987) (describing the interplay between "separation of powers" and "checks and balances").

<sup>18</sup> M. FARRAND, I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 232-33 (1937) [hereinafter RECORDS].

<sup>19</sup> *Id.*

<sup>20</sup> See II RECORDS, *supra* note 18, at 80-81. See generally Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 SYRACUSE L. REV. 1037, 1061-70 (1987) (tracing the history of the appointments clause). A series of speakers at the Convention opposed assigning the selection of judges to the president alone on the ground that the executive would use such power for his own ends. John Rutledge



The joint participation of the executive and the Senate in choosing judges unquestionably ushers politics into the selection scheme. It is hardly debatable that the president will attend to political considerations in making nominations. By the same token, the Senate may well counter the president's political strategy with its own.<sup>21</sup> Certainly our national history since 1787 demonstrates that the principal players have routinely regarded the judicial selection process as an arena for political maneuvering.<sup>22</sup> Of course,

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insisted, for example, that the new government would appear to be a monarchy if judges were appointed by a "single person." I RECORDS, *supra* note 18, at 119. Other members, James Wilson and Gouverneur Morris among them, opposed resting the appointment power in the Senate in order to avoid "intrigues, partiality, and concealment." *Id.* Wilson contended that wisdom resided in leaving judicial appointments to "a single, responsible person." *Id.*; see Ferling, *The Senate and Federal Judges: The Intent of the Founding Fathers*, 2 CAPITOL STUDIES 57, 62-63 (1974).

<sup>21</sup> I hasten to make clear that, in my view, the president must conform to constitutional standards even in the nomination of policymaking staff in the executive branch and, indeed, in the appointment of the White House chef and park rangers. The occasion for invoking the Constitution regarding appointive officers is not, then, the status of the federal judiciary in the national governmental structure. The point in the text is only that the Senate enjoys a telling authority with respect to judicial appointments and that, in this instance, the nature of the Supreme Court justifies special senatorial attention to the president's nominations. Just now, I mean only to acknowledge that the Senate will have politics in mind in its work; later, I will identify the constitutional standards that must also affect the Senate's judgment. In those instances in which the Senate gives "Advice and Consent" with respect to other "Officers of the United States" in the executive branch, the president's legitimate interest in naming men and women with his own policy-orientation may be due more indulgence. The individual elected to the presidency of the United States cannot personally perform the functions constitutionally contemplated for that office. Accordingly, it may, indeed, be unconstitutional, pursuant to article II or the tripartite balance of power struck by the Constitution's structure, for the Senate to hamstring the president by refusing to approve political operatives to "head" federal departments and other policymaking arms of the executive branch. *But see infra* Part V (discussing the possibility that Congress might establish a new Department of Judicial Selection).

<sup>22</sup> H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (1985); K. HALL, THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-61 (1979); J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 302-24 (1953); D. O'BRIEN, JUDICIAL ROULETTE 29-48 (1988); Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Chase, *Federal Judges: The Appointing Process*, 51 MINN. L. REV. 185 (1966); Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172 (Part I), 343 (Part II), 461 (Part III); Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 659-61 (1987); see also W. REHNQUIST, THE SUPREME COURT 235 (1987) (explaining that the president may properly take politics into account in nominating candidates for the Court).

the president cannot expect nominations to be confirmed routinely in the Senate in order that justices should be chosen after the fashion of lieutenants in the executive branch. In the case of cabinet members and other high-level administrative officers, it can be claimed that the president, having been elected to pursue policies discussed in the campaign, must be permitted to place persons personally committed to those policies into positions of authority to carry them out. The Supreme Court, by contrast, is not an instrument of executive policy but, by design, an independent branch of the national government.

Modern arguments to the effect that the Senate's role is only to appraise candidates' formal credentials or "qualifications"<sup>23</sup> derive alternatively from the happenstance that most nominees have not been controversial of late and from tendentious rhetoric portraying political opposition as illegitimate—for the rather obvious purpose of gaining approval for candidates likely to attract political doubt.<sup>24</sup> The constitutional framework contemplates quite a different arrangement. The executive will attempt to advance a political agenda through appointments to the Court, the Senate will answer in kind, and out of the resulting conflict will come conciliation, cooperation, and compromise.<sup>25</sup> There is ample support, then, for the view that the Constitu-

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<sup>23</sup> I put this word "qualifications" in quotations to flag it for investigation below. See *infra* Part IV(B)(1).

<sup>24</sup> See, e.g., Will, *The Democrats' Glass Chin*, NEWSWEEK, JULY 20, 1987, at 66 (contending that the Senate's role is "to address threshold questions about moral character, legal skills and judicial temperament" and insisting that Democrats could not legitimately oppose Robert Bork's appointment to the Supreme Court on political grounds); Johnston, *Reagan Hints at Bork Nomination Strategy: Stress Credentials, Not Views*, N.Y. TIMES, July 5, 1987, at 14, col. 1 (underscoring the strategic purpose for urging the Senate to "keep politics out of the confirmation process"); see Greenhouse, *Making a Federal Case of the Bork Nomination*, N.Y. TIMES, Aug. 12, 1987, at B6, col. 1 (demonstrating that all sides may engage in the same rhetorical strategy).

<sup>25</sup> This is not to suggest that the constitutional scheme necessarily augurs for colorless judicial candidates upon whom politicians with disparate political perspectives can agree. *But see* Friedman, *Balance Favoring Restraint*, 9 CARDOZO L. REV. 15, 17 (1987) (contending that Senate consideration of ideology will encourage the appointment of "the bland and the mediocre"). The structure may, however, impede the appointment of justices with "extreme" views. See, e.g., Dworkin, *From Bork to Kennedy*, N.Y. REVIEW OF BOOKS, Dec. 17, 1987, at 36, col. 2 (concluding that President Reagan's ultimate shift to Judge Anthony Kennedy represented a defeat for Judge Bork's understanding of constitutionalism). *But cf.* Safire, *Upgrade the Court*, N.Y. TIMES, Aug. 12, 1987, at A23, col. 4 (resisting the argument that moderates should be preferred for membership on the Supreme Court). And some argue that the structure should result in compromise. See *Considering Bork Calmly*, BOSTON GLOBE, July 19, 1987, at 86, col. 1 (contending that Judge Bork should not be confirmed if "his views could shift the court balance to one extreme in a way that might be detrimental to the nation"); Wicker, *The Bork Question*, N.Y. TIMES, July 18, 1987, at 27, col. 6

tion relies upon structural arrangements to police political skirmishing over judicial selection.

It hardly follows, however, that the Constitution bears on judicial selection *only* inasmuch as it orchestrates political influences on appointments. The Constitution is replete with structural arrangements of this kind, each of which may be cited as an effort to safeguard liberty by indirection. One body of the Congress cannot enact legislation without the other, the president enjoys a veto power, and the states may call for another convention. Yet no one supposes that any such checks occupy the field, providing the only means by which the Constitution restricts the exercise of power. We do not take legislation originating in the House to be valid simply because the Senate, too, adopted the bill and the president signed it. Arguing that judicial appointments can be made on the basis of politics unrestrained by ordinary constitutional standards simply because the appointments clause disperses the political influences brought to bear is rather like arguing that the only restraint on presidential power is impeachment.<sup>26</sup> Marvelous as our constitutional system may be, it is not "a machine that would go of itself."<sup>27</sup>

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(insisting that the Senate should look carefully into Bork's record and determine whether Bork was a "radical" who could upset the rights of citizens). I only mean to argue that interest-group politics do not threaten liberty vitally, so long as governmental power is dispersed and no single individual or group can dominate consistently to others' detriment. Nominations that Professor Ackerman has called "transformative," in the sense that they are meant to effect a change in constitutional law, are more worrisome. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1165 (1988) (comparing "transformative" appointments as a means of constitutional change with the more institutional process specified in article V). Yet experience shows that presidents are unlikely to be successful in that vein. *Id.* at 1183 (noting that justices tend to observe precedent and generally do not "merely serve as well-paid servants of the President who put them in office").

<sup>26</sup> Instances in which structural relationships occupy the field are rare. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (relying on political safeguards to restrain overreaching by Congress in the exercise of the commerce power) with *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (invalidating a state regulation of interstate commerce while recognizing that Congress might have enacted superseding legislation—but had not). It may also be pertinent to keep in mind the Supreme Court's increasing enthusiasm for enforcing separation-of-powers principles through litigation. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986) (invalidating the Gramm-Rudman-Hollings Act). In Part V, I describe methods by which executive and legislative officers and bodies can use their positions in the constitutional structure to ensure that other constitutional actors respect procedural and substantive standards for judicial selection—also constitutionally established.

<sup>27</sup> James Russell Lowell coined the phrase "a machine that would go of itself" in 1888. The passage reads as follows:

After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed. . . . We are a nation

Nor do the express terms of the appointments clause suggest that structural limits on power occupy the field. In the case of Supreme Court justices, the president is given the authority to "nominate." That term must, however, be interpreted. It is not self-evident that it must mean that the president can pick anyone for whatever purposes and without regard for any standard save personal predilections. Certainly it is unwarranted to assume that the selection of judges is merely "patronage."<sup>28</sup> Constitutional standards can and do govern presidential nominations just as they delimit any other form of executive behavior—and for the same reason. The president, like all federal officials, is sworn to uphold the Constitution.<sup>29</sup> The Senate's authority to give "Advice and Consent" must similarly be interpreted against the background of constitutional standards that control legislative duties of all kinds.<sup>30</sup>

In sum, the appointments clause does not end the Constitution's concern for the choice of Supreme Court justices; it merely specifies the elements of government that will apply constitutional standards and establishes the framework within which those standards will be brought into play. As to judges in the lower federal courts, the appointments clause is more oblique. District and circuit judges are probably "inferior officers" who may be named by "the President alone," by the "Courts of Law," or by the "Heads of Departments" according to the wishes of Congress.<sup>31</sup> Certainly nothing in the appointments clause suggests that *only* politics need be considered.<sup>32</sup>

The case for surrendering judicial selection entirely to politics is even

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which has struck oil, but we are also a nation that is sure the well will never run dry. And this confidence in our luck with the absorption in material interests, generated by unparalleled opportunity, has in some respects made us neglectful of our political duties.

M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 125 (1986). Dean Choper's attempt to defend wholly structural safeguards only with respect to federalism and separation-of-powers matters also meets difficulty. See Sager, *Constitutional Triage*, 81 COLUM. L. REV. 707 (1981).

<sup>28</sup> Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 AM. B. FOUND. RES. J. 285, 286-87 (ascribing this view to most "legal scholars and legal historians").

<sup>29</sup> This is true even when the president's action is most obviously political in its policy orientation. We fully expect that the president will feel free to veto legislative bills on political grounds. Yet, I expect all would agree that the Constitution would be violated if the president were to exercise the veto power for the purpose of punishing African Americans.

<sup>30</sup> See, e.g., Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 63-64 (1986) (arguing that the Constitution requires Congress to determine the constitutionality of proposed enactments, especially in "political question" cases).

<sup>31</sup> U.S. CONST. art. II, § 2.

<sup>32</sup> See *infra* Part V.

weaker at the state level. It is not that the fourteenth amendment expressly refers to state judges and specifies the basis on which they are to be chosen—any more than it lays down precise rules for the conduct of any other state business. The critical point is that the equal protection and due process clauses recognize no exception for judicial selection. Their mandate runs to all state action. While those provisions must be interpreted for purposes of any concrete application, it seems clear that when executive authorities, legislators, and *judges* are selected those constitutional provisions have *something* to say. Just what that something may be is another question, to which I will return.

## II. UNWARRANTED WORRIES: DISCOVERABLE STANDARDS AND POPULAR ELECTIONS

The inadequacy of the argument that the Constitution relegates judicial selection to politics suggests that something else drives the common hesitancy to identify and apply constitutional standards in this context. Simply put, there is doubt that constitutional standards for choosing judges can be identified and honed in a satisfying manner.<sup>33</sup> Anticipating failure in any such quest, we disclaim the responsibility to launch it.

We may have many reasons to worry about our constitutionalism, but this is not one of them. There is nothing all so unmanageable about modern constitutional analysis generally. Even such expansive notions as due process and equal protection can generate workable doctrine and acceptable results.<sup>34</sup> To be sure, constitutional law has ragged edges, and in the hands of imaginative interpreters it can take surprising shape. But this is merely to acknowledge the value judgments on which decisionmakers necessarily depend in forging meaning for legal materials.<sup>35</sup> It is simply misguided to think that conventional checks on governmental power cannot be groomed to fit judicial selection. The task of determining the constitutionality of executive and legislative action is never easy, but it is no more difficult here than anywhere else.

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<sup>33</sup> Another relative of the “political question” doctrine seems to be in play—namely the claim that there are no “judicially discoverable and manageable standards for resolving” the judicial selection question. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>34</sup> *Cf. United States v. Guest*, 383 U.S. 745, 753-54 (1966) (holding that a federal criminal conspiracy statute was not impermissibly vague merely because it authorized indictments charging violations of the equal protection clause).

<sup>35</sup> This, of course, is a common acknowledgment of long standing in American constitutional law. *See, e.g.,* G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 35-63 (1976) (describing the values that Kent, Story, and Shaw brought to early constitutional treatments of property). While controversial versions of the same idea have appeared in the Critical Legal Studies literature, I take the point in the text to be consistent with the better reasoned presentations within even that genre. *See, e.g.,* Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984).

Things *would* be troublesome if it were assumed, as it is in some quarters, that if there is any constitutional standard for choosing judges, it is popularity—the test applied in selecting other agents of governmental authority in a democracy.<sup>36</sup> The possibility that candidates could run for office in popular elections might recommend itself as an answer to our ambivalence regarding the content of constitutional standards for filling judicial positions. The argument for judicial elections is bolstered by the widespread acknowledgment that courts make law in company with legislatures. The counter-majoritarian difficulty and a battery of problems like it might be resolved simply by subjecting judges to the discipline of the polls.<sup>37</sup>

Yet the prospect that the search for constitutional standards for selecting judges may lead to elections is unsettling. Judicial elections would upset the structural arrangements established by the appointments clause and article III for the maintenance of federal judicial independence and thus would threaten the “separation of powers” and “checks and balances” safeguards.<sup>38</sup> Constitutionally mandated judicial elections would also re-

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<sup>36</sup> See Golomb, *Selection of the Judiciary: For Election*, in JUDICIAL SELECTION AND TENURE 74, 75 (G. Winter ed. 1973) (advocating the election of judges) [hereinafter JUDICIAL SELECTION].

<sup>37</sup> Note, however, that the actual response to the recognition of the policymaking role of the Supreme Court has been wider participation in the confirmation process. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988). An election may be employed both as a process by which public officers are chosen, with each voter applying selection standards known only to him or her, and as a substantive basis for accepting an elected official's authority to rule, with the aggregated preferences of a majority of voters being sufficient to justify the exercise of governmental power. Cf. Sager, *supra* note 9 (making the point in a different context). In the text, I have in mind the latter function. Thus it may be proposed that judges are entitled to do what they do only if they obtained their offices by winning popular support.

<sup>38</sup> The mere existence of constitutional text providing for the appointment of federal judges does not necessarily settle the question whether federal judges could be elected. The fifth amendment's due process clause and the wealth of constitutional analysis built up in this century postdate those provisions in the body of the original document. Subsequent constitutional developments may supersede important sections of the Constitution, and it is at least conceivable that long-established and accepted understandings respecting federal judges may have to be discarded in the wake of modern reappraisal. The thirteenth amendment abolished slavery, previously recognized in the Constitution as valid, albeit implicitly. The seventeenth changed the method of choosing senators; the twenty-first repealed the eighteenth.

Nor is appointment essential to maintaining judges' independence from popular sentiment. Whatever the means of selection at the outset, a guarantee of lengthy tenure can protect sitting judges as they render what may be unpopular decisions. See Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669, 1680-89 (1988). But see Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*,

verse our widely acclaimed turn *away* from electoral schemes for choosing judges in hopes of mitigating the ills of such elections and generating jurists of greater "merit."<sup>39</sup> The ground now held by the "merit" system championed by the American Judicature Society and other reform-minded groups would be painful to lose.<sup>40</sup>

Here again, however, there is no cause for alarm. Our best scholarship demonstrates that the task assigned to judges in constitutional cases is

95 YALE L.J. 455, 496 (1986) (contending that the election of state judges may deprive litigants of an independent tribunal—a denial of due process).

<sup>39</sup> The essentials of our unhappy experience with electing judges are well known. The original states entrusted the selection of judges to their legislatures or governors and, apparently to ensure independence, most of those states accorded to judges so selected tenure during good behavior. E. HAYNES, *THE SELECTION AND TENURE OF JUDGES* 98-99 (1944) (pointing out as well that in a number of states the legislature appointed the governor). See Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138-47 (summarizing the rules pertaining to the selection and tenure of judges in the original states). None shifted to judicial elections until the early 1800s, by which time the consuming force of popular democracy in Europe and America recommended the election of any and all government officials. See M. VOLCANSEK & J. LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* 75-98 (1988) (noting particularly the influence of the French Revolution). The election of judges, in Evan Haynes's telling, was "a mere item in a long list of other democratic and humanitarian changes." E. HAYNES, *supra*, at 89. Notwithstanding eloquent warnings from Justice Story and others, the trend accelerated during the Jacksonian period and through the Civil War. See J. STORY, *Progress of Jurisprudence*, in MISCELLANEOUS WRITINGS 198, 208-11 (2d printing 1972). With judicial elections, of course, came allegations of abuse, corruption, and general malfeasance. *Id.* (setting forth Story's speech); see also E. HAYNES, *supra*, at 98 n.20 (citing a speech by Rufus Choate at the 1853 Massachusetts Constitutional Convention); 2 Official Report of the Debate and Procedures in the State Convention to Revise and Amend the Const. of Mass. 799-811 (1853), reprinted in 17 J. AM. JUDICATURE SOC'Y 10, 10-20 (1933) (setting forth Choate's speech). For a review of current state selection schemes, see M. COMISKY & P. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 3-37 (1987).

<sup>40</sup> See generally Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, in JUDICIAL SELECTION, *supra* note 36, at 29-44 (discussing the evolution of the merit plan in this century). Some notable names have been associated with the movement toward the appointment of judges. See, e.g., Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 531-32 (1926) (contending that the public will not necessarily choose the best candidates); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC'Y 178, 180 (1937) (suggesting that voters may select unqualified judges); Taft, *The Selection and Tenure of Judges*, 38 REP. A.B.A. 418 (1913) (arguing against judicial elections). See generally J. GROSSMAN, *LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION* (1965) (describing the American Bar Association's role in efforts to choose federal judges according to "merit").

emphatically *not* to exercise majoritarian power but to enforce admittedly nonmajoritarian principle—which may conflict with majority preferences of the moment.<sup>41</sup> Mainstream American legal thinking distinguishes primarily representative governmental bodies (like legislatures) from primarily judgmental institutions (like courts).<sup>42</sup> Thus while it may be acceptable on occasion to explain that legislators are elected on the ground that their function is to substitute for the public at large, the same contention cannot be made respecting judges, who are not *supposed* to *represent* anyone. Judges make law, to be sure, but they do not vindicate the perceived aggregate preferences of the electorate; they do not serve as surrogates for a majority of citizens who, if asked, might decide cases by a nose count. Judges do not guess at the results a referendum might produce but engage in a subtle and sophisticated analysis of what the law *ought* to be. Popular election is only one constitutionally valid basis for choosing (state) judges. Appointive schemes are perfectly acceptable so long as they incorporate attention to the constitutional considerations developed in Part III. Those standards serve democratic values even though judges are not elected directly but are named to the bench by other governmental agents—who, of course, are themselves elected.

### III. CONSTITUTIONAL JURISPRUDENCE

The search for the Constitution's meaning for judicial selection begins where any constitutional inquiry must—with the text and its interpretive

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<sup>41</sup> This thinking benefits, of course, from the lessons of legal realism. See J. FRANK, *LAW AND THE MODERN MIND* 121 (1930) (explaining that judges routinely create new law). See generally L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 3-10 (1986). And it survives rhetoric from both the left and the right. I have in mind, on the left, those elements of the Critical Legal Studies movement that attack adjudication in the liberal state as a thinly veiled effort on the part of those in power to further their own preferences. See, e.g., Tushnet, *Perspectives on Critical Legal Studies: Introduction*, 52 GEO. WASH. L. REV. 239, 240-41 (1984). On the right, some vendors of the law-and-economics approach to legal problems also look upon the work of judges as the reflection of preferences. See, e.g., Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815 (1982).

<sup>42</sup> Kornhauser and Sager make clear that the genuine distinction is not between governmental institutions themselves but between functions performed by those institutions. They point out that it is possible and entirely appropriate for a single governmental institution to engage in decisionmaking of all or most types and that the nature of institutions' proper purpose or purposes determines the appropriateness of a model of decisionmaking for the particular exercise. Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 91-92 (1986). For my purposes, however, it is sufficient to distinguish legislatures from courts on the basis of the *primary* function performed by each.



history.<sup>43</sup> Yet the realistic pursuit of constitutional law in action leads

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<sup>43</sup> In this discussion I lay aside two intractable intellectual issues that have attracted attention of late. First, the very existence of the Constitution seems anomalous in a political system that purports to be democratic. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980) [hereinafter *DEMOCRACY AND DISTRUST*]. A written fundamental law seems to contemplate that the will of those who drafted, proposed, and ratified it can in some fashion control the wishes of later generations. One who comes to terms with constitutionalism, moreover, faces a second problem: the claim that the text of the Constitution, or, indeed, any text, holds no determinable meaning apart from the significance it is given by its interpreters. A sizeable body of opinion ascribes to text a life of its own, an existence unburdened by the responsibility to communicate ideas. By this account, the creator enjoys no authorial sovereignty over language reduced to writing; a text is not a mere tool for conveying meaning to others. Constitutionalism is thus not only incoherent in a democracy; it is impossible in any political system. See generally S. FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (arguing that interpretation is inherently subjective); *THE POLITICS OF INTERPRETATION* (W.J.T. Mitchell ed. 1983) (collecting essays); *Interpretation*, 58 S. CAL. L. REV. 1 (1985) (discussing theories of interpretation generally); *Law and Literature*, 60 TEX. L. REV. 373 (1982) (discussing the complexities of interpretation in both law and literature); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) (arguing that rules that purport to impose objective limits on interpretation are themselves subjectively interpreted). But see Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (arguing that objective rules impose limits on legal interpretation). This problem, too, must be negotiated if we are to get on to still others. Professor Sager has recently landed some impressive blows against the problem of the Constitution itself. Sager, *supra* note 9 (arguing that majoritarianism "sponsors a crabbed and implausible view" of constitutional law and describing rights-bearing provisions as "instantiations of a more general and interpretively fertile conception of political justice"). And Robert Cover spent his last academic efforts on the relationship between legal analysis and interpretation generally. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 816 (1986) (arguing that legal analysis is "inextricably bound up with the real threat or practice of violent deeds"); see also Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628-29 (1986) (contending that there are "limits to the commonality and coherence of meaning that can be achieved in legal interpretation"); cf. Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987) (insisting that many voices may speak through a constitutional text).

Moving (right along) to other preliminary matters, it is common currency that our constitutional history is strewn with failed attempts to explain judicial review. I hardly attempt here to provide a complete discussion. See Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987) (presenting as good a list as any of the current forms of constitutional argumentation). Nineteenth-century formalism largely ignored the problem, and calls to "originalism" are more strident and simplistic than they are probing and persuasive. On the many faces of formalism, see Schauer, *Formalism*, 97 YALE L.J. 509 (1988). For illustrations of "originalism," see Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 (1979); Rehnquist, *The Notion of a Living Constitution*,

quickly to the doctrine the Supreme Court fashions and refashions each October Term.<sup>44</sup> As we shall see, that doctrine is driven by underlying philosophical ideas about the way in which free women and men should govern and be governed.

Inasmuch as the equal protection clause supplies a specific textual basis for the equality idea in constitutional law, that clause has been the springboard for doctrinal innovations ranging well beyond the fourteenth amendment's own confines. The formulation is familiar. The Court insists at the outset that classifications found in governmental policies are instrumental in nature; they serve and must serve some "legitimate" objective of the police power.<sup>45</sup> Most classifications are sustained if they rationally further some such objective.<sup>46</sup> Others must bear a "substantial" relation to an "important" objective;<sup>47</sup> still others must be "necessary" to some "compelling" governmental end.<sup>48</sup> To the casual reader, then, the validity of any given policy appears to turn on the "fit" between the classification it embodies and the mischief the government wishes to eradicate. And equal protection analysis is apparently reduced to arid logic.<sup>49</sup>

On closer examination, it appears that the fit between classifications and objectives is not critical in itself but is a mechanism for detecting the state's true ends—which *do* determine the validity of the policy in issue. Thus, for example, a race classification's relation to an apparently legitimate gov-

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54 TEX. L. REV. 693 (1976); see also Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177 (1987) (offering a description of variations and similarities within originalist writings). A host of rigorous critiques have nailed the originalist coffin shut. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 238 (1980) (arguing that "one can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago"); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470-71 (1979) (arguing that judges cannot determine original intent in any case); Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 135, 164 (1986) (pronouncing originalism "untenable").

<sup>44</sup> See Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 211 (1985) (discussing the formulaic style of constitutional lawmaking).

<sup>45</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985) (invalidating a provision of a state constitution because the purpose was not "legitimate").

<sup>46</sup> See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (sustaining a New York City traffic regulation even though it failed to address all traffic hazards).

<sup>47</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (discussing a gender-based classification).

<sup>48</sup> See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (addressing a racial classification).

<sup>49</sup> For an exhaustive treatment of the necessary fit between means and ends in equal protection analysis, see Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447 (1989).

ernmental purpose is strictly scrutinized in order to ensure that the objective put forward to justify it actually explains the policy under attack.<sup>50</sup> Most such classifications are struck down, ostensibly because they are not deemed to be necessary to a legitimate and compelling objective, but actually in an abundance of caution. The Court would rather reject even race-conscious rules that appear to have some rational explanation than risk mistaken approval of race classifications actually created in response to impermissible, racist sentiments.

This insight, born of attempts to forge a satisfying equal protection analysis, reverberates across a range of constitutional problems, forcing courts and commentators alike to focus on the purposes, stated and unstated, for which government acts.<sup>51</sup> The emphasis on purpose underscores two related questions: how it is that the Court can assume that government must have objectives for its legislative enactments and how it is that the Court can presume to pronounce any such objectives constitutionally illegitimate. The best of recent scholarship makes its most important contributions at this

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<sup>50</sup> This explanation was initially advanced in the literature. See, e.g., Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1067 (1978); DEMOCRACY AND DISTRUST, *supra* note 43, at 145-48 (contending that strict scrutiny is used to "flush out" unconstitutional legislative motivations); Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 992 (1983) (arguing that the sole purpose of multi-tiered review is to determine the actual purpose behind a rule). Later, it was apparently embraced by the Court. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721-23 (1989) (indicating that "[i]ndeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985) (stating that legislative classifications the Court considers suspect "are deemed to reflect prejudice and antipathy" and thus are subject to strict scrutiny); see also Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984) (arguing that the purpose of intermediate scrutiny in gender-classification cases is to discover illegitimate legislative motivations); Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1193 (1986) (identifying a stricter means-ends review for the same purpose even in nominally rationality-review cases); Note, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1468 (1986) (noting the same tendency).

<sup>51</sup> Indeed, the crux of most modern constitutional analysis, touching equal protection and myriad other textual bases, is that valid governmental policymaking posits some identifiable purpose the Court is prepared to accept as constitutionally permissible. See, e.g., *United Bldg. & Constr. Trades v. Camden*, 465 U.S. 208 (1984) (privileges and immunities clause, art. IV, § 2); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (dormant commerce clause); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (substantive due process). See generally Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

juncture. The literature posits that legislative lawmaking is predominantly instrumental, recognizes that courts require a theoretical basis for declaring some legislative objectives out of bounds, and then supplies the necessary working principle. That principle, in turn, is implemented through the Supreme Court's more concrete doctrine.<sup>52</sup>

The ideas that have been floated are as disparate as they are stimulating, and I should not wish to be understood to neglect either the intricacies of the arguments or the profound differences of opinion everywhere apparent. Yet for present purposes an overlap can be identified in the work of three contributors who have been extraordinarily influential of late: Ronald Dworkin, John Hart Ely, and Cass Sunstein. All three would agree, I think, that American constitutional democracy looks to courts to ensure something quite different from simple majoritarianism. Courts insist upon political decisionmaking with a vision of the general, public interest—which, by its nature, embraces all citizens as equals and accords equal weight to their legitimate preferences.<sup>53</sup>

Dworkin approaches constitutional law from moral philosophy, insisting that a satisfying explanation for judicial interpretation of the Constitution depends on the recognition of a political morality traceable to the legal practice that has ripened in this culture. Within his larger jurisprudential framework, Dworkin proposes that law of any ilk is "structured" by a "coherent set of principles about justice and fairness and procedural due process" in the relevant society.<sup>54</sup> In constitutional cases, judges are called upon to shape their decisions to the "most basic arrangements of political power in the community," thus to "draw from the most philosophical reaches of political theory."<sup>55</sup> The "interpretive attitude" Dworkin urges upon judges contemplates that legal phenomena do not merely "exist"; they have positive "value."<sup>56</sup> They serve "some interest or purpose" or enforce "some principle."<sup>57</sup> They have, Dworkin states bluntly, some "point"

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<sup>52</sup> Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981) (noting a revival of "Grand Theory" in constitutional scholarship).

<sup>53</sup> See Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1503 (1985) (pointing out that Sunstein and others attempt not so much to "allay" concern for the countermajoritarian difficulty as to "displace" it).

<sup>54</sup> LAW'S EMPIRE, *supra* note 8, at 243. For Dworkin, the genuine challenge arises in "hard" cases, in which no "right" interpretation of existing legal materials recommends itself after judges discard demonstrably aberrant possibilities inconsistent with the "brute facts of legal history." *Id.* at 255-56; see also TAKING RIGHTS SERIOUSLY, *supra* note 8, at chs. 4-5 (discussing judges' duty to discover a party's rights in "hard cases"). Faced with such cases, judges should choose results from "eligible interpretations" that show the community's public standards in a "better light from the standpoint of political morality." LAW'S EMPIRE, *supra* note 8, at 256.

<sup>55</sup> LAW'S EMPIRE, *supra* note 8, at 380.

<sup>56</sup> *Id.* at 46-47.

<sup>57</sup> *Id.*

which influences the meaning that can be assigned to them over time.<sup>58</sup> Suffice it to say, this "point" partakes of the "public standards" it is the task of interpretation to vindicate. Dworkin thus recognizes the very same, or at least very similar, instrumentalism apparent in the Court's current constitutional doctrine. In his view, the notion that rules must further legitimate objectives in order to be valid is explained as an essential element of the very nature of law as a practice or set of practices with some identifiable purpose.

Dworkin rejects any suggestion that simple majorities can do what they will, restricted only by propositions they themselves accept. He recognizes individual "rights" against majoritarian power and insists that one such right is the entitlement of all citizens to be treated "as equals."<sup>59</sup> While majorities can select from a range of policies, and certainly may establish rules that treat people differently, they cannot neglect some citizens entirely in the formulation of policy. Rather, majorities must, if they operate properly, accord "equal concern and respect" to all citizens in marking off the future.<sup>60</sup> It is a small step from here to say that majorities are restricted to objectives in the "public interest," which necessarily includes concern for the interests of all even if, in the end, some citizens receive fewer benefits or bear heavier burdens than others. There *is*, then, a satisfying explanation for judicial decisions that refuse to credit some objectives as constitutionally acceptable. Legislatures are empowered to make policy through law so long as the "point" of that policy is consistent with individual "rights," including the right to be treated as an equal. The source of this right is the courts' effort to plumb the culture's public morality in order to interpret the Constitution in a way that shows the idea of equality in its best light—given our

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<sup>58</sup> Dworkin distinguishes two assumptions underlying the "interpretive attitude" judges should strike. One, noted in the text, is that legal practices are instrumental; the other is that explicit rules in pursuance of some "point" may change, but in changing remain "sensitive" to the "point." *Id.* at 47-48. As Fred Schauer has explained, the "point" of a measure under examination is not (for Dworkin) limited to the immediate purpose for which it was promulgated but extends to the more abstract "point" back of "the entire system." Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 854 (1987). Dworkin's insistence that every judicial decision must be reconciled with the ultimate reaches of the jurisprudential universe in which the decision is made asks of legal propositions much more than does current constitutional doctrine. Still, it seems fair to identify the instrumentalism embedded in his theory and to link that purposive perspective (however roughly) to the constitutional standards I mean to explore.

<sup>59</sup> LAW'S EMPIRE, *supra* note 8, at 376, 381.

<sup>60</sup> Accordingly, under Dworkin's "banned sources" account of a race discrimination claim, race-conscious rules are invalid if they aggregate preferences stemming from racial bigotry. *Id.* at 384. Preferences "that are rooted in some form of prejudice against one group can never count in favor of a policy that includes the disadvantage of that group." *Id.*

philosophical history. Dworkin denies that all this is in any fashion undemocratic.<sup>61</sup> By contrast, he asserts that the Constitution is the "parent and guardian" of democracy as we Americans know it—and that we know it to insist upon respect for rights rooted in our moral history.<sup>62</sup> When, accordingly, Dworkin's ideal judge, Hercules, presumes to hold a statute invalid, he does so in furtherance of his "most conscientious judgment" about what the Constitution "really means" and what democracy "really is."<sup>63</sup>

In sharp contrast to Dworkin's appeal to moral theory, Ely offers process, not substance, as a justification for judicial review. He finds little agreement among moral philosophers and few substantive values incorporated into the constitutional text. Courts, in his view, should therefore devote their efforts to the maintenance of a structure, which *is* enshrined in the Constitution, governing the way in which momentary majorities resolve policy disputes.<sup>64</sup> For Ely, the nature of the American system as a representative democracy implies that, all things being equal, determinations of good policy are made by "elected representatives" whose choices are entitled to prevail.<sup>65</sup> If the people object, they are free to turn the rascals out. If, however, the representative process malfunctions, such that it is no longer worthy of trust, courts may exercise a veto in the name of process-purification. Mere dissatisfaction with legislative results is, by Ely's account, insufficient to warrant judicial interference—even if the action under examination conflicts with moral traditions and values courts can, or think they can, identify. Rather, judicial override is justified when those in power are "choking off the channels of political change" to maintain their advantage with respect to out-groups or when legislators representing a majority systematically denigrate the interests of minorities "out of simple hostility or a prejudiced refusal to recognize commonalities of interest . . . ."<sup>66</sup>

As far from Dworkin as he may be (and that is quite far),<sup>67</sup> Ely neverthe-

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<sup>61</sup> Dworkin concedes, of course, that the very notion of any individual right in the teeth of majority preferences demands explanation in a democracy. But he rejects both the contention that the Constitution is itself undemocratic and the contention that, in this constitutional scheme, democracy is interchangeable with majoritarianism. *Id.* at 398-99.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* But see Stick, *Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire*, 34 UCLA L. REV. 371, 422-23 (1986) (underscoring that Dworkin's theory permits courts to override majoritarian decisions and thus to impose outcomes without explicit consent).

<sup>64</sup> DEMOCRACY AND DISTRUST, *supra* note 43, at 57-58 (rejecting guidance from moral philosophy); *id.* at 90 (contending that the Constitution primarily establishes structure).

<sup>65</sup> *Id.* at 103.

<sup>66</sup> *Id.*

<sup>67</sup> Dworkin marks himself off from Ely in Dworkin, *supra* note 43, at 500-10 (rejecting any argument that the courts should focus exclusively on process). Ely critiques some features of Dworkin's work in Ely, *Professor Dworkin's External!*

less recognizes and, indeed, relies heavily upon some ideas also identifiable in Dworkin's work. Those ideas, in turn, are precisely the elements of the constitutional analysis in which we are interested. Ely, too, builds his explanation for judicial behavior in constitutional cases around the expectation that legislatures make law instrumentally—for reasons. Inquiries into the "intention" for which legislatures act "permeate" his approach to constitutional law.<sup>68</sup> Moreover, some intentions are constitutionally impermissible. Indeed, in evaluating legislative purpose, Ely explicitly invokes Dworkin's claim that citizens are entitled to "equal concern and respect."<sup>69</sup> For Ely, it is not enough that comparatively powerless individuals and groups are permitted to speak and to vote, such that the political process is formally open to all.<sup>70</sup> When legislative "in-groups" neglect the interests of legislative "out-groups" by attaching no weight to the latter's interests in the making of policy, the product is for that reason constitutionally suspect.<sup>71</sup> Compared to Dworkin, Ely appears to leave the legislative branch considerable room in which to operate. He forbids courts to judge the substantive merits of legislation and limits them, instead, to an appraisal of the process that produced it—process, albeit, in Ely's terms.<sup>72</sup> What counts for present purposes, however, is that Ely's arguments regarding judicial review allow him to link his brand of constitutionalism to democracy properly understood.<sup>73</sup>

Sunstein elaborates upon these same themes and relates them even more tightly to current constitutional doctrine. He distinguishes the pluralist, market model of politics so much in fashion in the 1950s and occasionally

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*Personal Preference Distinction*, 1983 DUKE L.J. 959 (arguing that decisionmakers may consider external as well as internal preferences).

<sup>68</sup> DEMOCRACY AND DISTRUST, *supra* note 43, at 129-30.

<sup>69</sup> *Id.* at 82.

<sup>70</sup> *Id.* at 135.

<sup>71</sup> *Id.* at 159.

<sup>72</sup> Again, Ely does not mean to restrict judicial override to cases in which an out-group has been barred from participating in the political process. Rather, he would have the courts trump legislative choices that deny equal concern and respect to such out-groups—however unobjectionable the formal political machinery may appear to be. *Id.* at 136. For an argument that in this Ely cannot be solely majoritarian, see Sager, *supra* note 9, at 9-13.

<sup>73</sup> If anything more is needed, Ely draws upon the history of republican theory, which, he contends, suggests that at least some American constitution-makers conceived of the nascent government as one that would structure political life for a society in which citizens enjoy equal legal footing. The equal respect idea is thus located in the history behind the Constitution now to be interpreted. DEMOCRACY AND DISTRUST, *supra* note 43, at 79. The Constitution's explicit exhortation to the national government to "guarantee to every State in this Union a *Republican* Form of Government," U.S. CONST. art. IV, § 4 (emphasis added), presents no occasion for embarrassment. Republicanism is not majoritarianism but a check upon majoritarian tyranny.

embraced by modern theorists<sup>74</sup> from an older, republican conception of politics ascribable to Madison.<sup>75</sup> The latter model credits citizens and their representatives with the ability to rise above private interest and, through discussion, aspire to a more general "public good."<sup>76</sup> The primary threat to good government is the corruption associated with factions; the core safeguards for good government are arrangements ensuring that representatives pursue the public good. This political theory approaches the instrumentalism with which Dworkin and Ely are concerned. Thus it is insufficient that policy emerges from a legislative struggle among competing interests, the product of a pooling of "naked preferences."<sup>77</sup> Government policy must

<sup>74</sup> See, e.g., R. DAHL, A PREFACE TO DEMOCRATIC THEORY 137 (1956) (contending that the central theme in "American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage" in the decision process); D. TRUMAN, THE GOVERNMENTAL PROCESS (2d ed. 1971) (arguing that individuals identify with groups and that those groups are as much a part of government as political parties); Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3 (1971) (examining the characteristics of the political process that allow small groups to regulate the economy). See generally D. HELD, MODELS OF DEMOCRACY 186-220 (1987) (criticizing Truman and Dahl's "classic" pluralism); cf. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 906-08 (1987) (reading Holmes's dissent in *Lochner* to reflect a pluralist attitude).

<sup>75</sup> Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 42 (1985) (distinguishing modern pluralism from Madison's vision of a representative government free to deliberate on the greater public good). But see Krouse, 'Classical' Images of Democracy in America: Madison and Tocqueville, in DEMOCRATIC THEORY AND PRACTICE 58, 62-67 (G. Duncan ed. 1983) (contending that Madison actually rejected civic virtue in favor of an "interest-oriented principle").

<sup>76</sup> Sunstein, *supra* note 75, at 31 (describing republican insistence that private interests be subordinated to the public good). The standard sources for republican theory are B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (arguing that Revolutionary leaders envisioned a republican government controlled by independent citizens capable of separating themselves from the "petty selfishness of ordinary men"); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 46-91 (1969) (tracing the history of American republicanism); see also J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s (1984) (demonstrating the ambiguities within American republican thinking in the colonial period). Mark Tushnet insists that the very notion of the public interest is inconsistent with conventional liberalism. Tushnet, *supra* note 53, at 1539; cf. S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 247-52 (1984) (recalling that nineteenth-century liberals such as Constant discounted any objective notion of the public good). But see Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113-43 (S. Hampshire ed. 1978) (claiming that liberalism does include some notion of the public good—equality and fair systems of distribution).

<sup>77</sup> Sunstein, *supra* note 50, at 1689 (arguing that various provisions of the Constitution are intended to prevent the distribution of resources from being determined solely by the exercise of raw political power).



promote legitimate public values, identified through deliberations that take all citizens' interests into account.<sup>78</sup>

Here again, the elements of current constitutional doctrine can be identified in a political theory that purports to be democratic: republicanism. Sunstein rejects simple majoritarianism and seizes instead upon the representative character of American government. Republicanism, as Madison and others understood it, contemplates that legislative policies will not justify themselves but must further some objective—and not any objective, but one that comports with the public good as that matter is sorted out in deliberations among duly elected representatives. In those deliberations, the interests of all citizens must be accorded equal weight. While it is possible, indeed likely, that policies in the public interest will burden different citizens differently, it is never acceptable that the interests of some should be ignored in the formulation of the objective to be pursued. Any such purpose is not in the public interest and is therefore illegitimate constitutionally.<sup>79</sup>

It is plain from this brief survey that Dworkin, Ely, and Sunstein, each in his own way, can be cited in aid of the “principled” constitutional democracy that is ours.<sup>80</sup> We neither have nor want a society ruled by raw majoritarianism. To the contrary, we want and have a governmental system in which politically accountable institutions fashion public policy under a constitutional injunction to treat all citizens as equals. Governmental objectives that neglect disfavored individuals and groups are for that reason constitutionally impermissible. It remains to bring these ideas to bear on the selection of judges.

#### IV. JUDICIAL SELECTION AND CONSTITUTIONAL COMMAND

##### A. *Procedural Standards*

I begin with what may be called procedural constitutional standards for judicial selection, that is, standards governing the way in which decision-

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<sup>78</sup> See also Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 73-75 (1986) (positing that the object of self-government is freedom and that freedom consists of self-direction “by norms cognizant of fellowship with equally self-directing others” and that “one realizes one’s own freedom only by confirming that of the others”).

<sup>79</sup> Sunstein, *supra* note 75, at 51-52 (arguing that the Constitution requires representatives to separate themselves from the struggle of private interests and to promote the common good). *But see* Tushnet, *supra* note 53, at 1540-44 (marshalling shortcomings in Sunstein’s attempt to give content to the notion of public values).

<sup>80</sup> Harper & Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1212, 1223-27 (1985) (noting that modern theorists reject strict majoritarianism in favor of a democracy that includes protections against majority interest groups).

makers locate candidates for judicial positions.<sup>81</sup> The essential constitutional requirement is plain enough: mechanisms for isolating judicial candidates from the general population must further the public interest. The Constitution commands equal concern and respect for all citizens. It will not do, then, to neglect some citizens or groups of citizens out of hostility to them or their interests. A selection scheme is constitutional only if it manifests at least the potential to generate candidates from any and all quarters wherein qualified candidates<sup>82</sup> who are constitutionally entitled to be considered may be found.<sup>83</sup>

### 1. Judicial Elections

Schemes in which judges are elected test the principle of equal concern and respect in a deceptive fashion. At first glance, it may appear that the Constitution can be satisfied by simply applying to judicial elections the familiar rules developed for ordinary electoral affairs. Thus, for example, the prohibition on deliberate race discrimination, in all its forms, must be respected in legislative and judicial elections alike.<sup>84</sup> This *is* where the Con-

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<sup>81</sup> The procedural label is a bit misleading inasmuch as I mean to apply the "legitimate public interest" test for governmental policy,—a matter, I should think, of substance. Still, it seems helpful to distinguish what I contend for in this section from the plainly substantive standards invoked in the next.

<sup>82</sup> See *infra* Part IV(B)(1) (discussing candidate "qualifications").

<sup>83</sup> See *infra* note 94.

<sup>84</sup> *Accord* Voter Information Proj. v. City of Baton Rouge, 612 F.2d 208, 212 (5th Cir. 1980) (invalidating an at-large scheme for electing city and state judges). It seems sensible, moreover, to invoke statutory standards like the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982), as well—there being no reason to think, once elections are posited, that racism demands any less attention in the context of selecting judges than it does with respect to choosing any other governmental officials. It is settled already that section 5 of the Act, the "preclearance" provision, is applicable. *Haith v. Martin*, 618 F. Supp. 410, 412-13 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986); *accord* *Kirksey v. Allain*, 635 F. Supp. 347, 349 (S.D. Miss. 1986). The availability of section 2, the Voting Rights Act's substantive standard, is less certain. While the statutory language is broad, and the legislative history thin, one reference to the ability of voters "to elect *representatives* of their choice," § 1973 (emphasis added), supports the contention that section 2 is inapplicable to judicial elections. *But see* *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988); *Mallory v. Eyrich*, 839 F.2d 275, 281 (6th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987)—all finding the reference to "representatives" insufficient to prevent the application of section 2.

In *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986), the Court held that a multi-member election structure for the selection of legislators violated section 2. Kathy Abrams has criticized *Gingles* for focusing primarily upon the capacity of minority groups to elect candidates of their own to office and for according too little attention to the ability of such groups to participate in political processes generally. Inasmuch as my concern is not for black voters but for potential black judges, the emphasis in the text on the performance of black candidates is not subject to the same criticism.

stitution leads. Yet the analysis regarding judicial and legislative elections must be quite different. Existing standards for the conduct of legislative elections vindicate the right of citizens to vote for candidates of their choice.<sup>85</sup> Having rejected the representational model for courts, we require another justification for applying the same or similar standards to the election of judges.<sup>86</sup>

There is no *a priori* rule for identifying judges in this society. Judges are chosen deliberately, by a device established through governmental action. That action, in turn, is subject to constitutional requirements, including the requirement that all citizens be respected as equals. If, then, government chooses to select judges by election, the machinery put in place must open the field of candidates to all comers. No state can fairly claim to be choosing judges constitutionally, this is to say democratically, if, for example, it deliberately decides to elect candidates by way of a mechanism that denies African Americans the opportunity to be chosen and thus excludes them from power. Black candidates, by this account, are entitled to consideration not merely because black voters may wish to support them but because their exclusion would signify an electoral scheme that undervalues blacks and their interest in serving on the bench.<sup>87</sup>

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See Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 62 N.Y.U. L. REV. 449 (1988).

<sup>85</sup> This is true of ordinary cases in which some citizens are barred from the polls, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating a poll tax exacted as a precondition to voting), in vote "dilution" cases, e.g., *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (striking down an at-large scheme established for the purpose of diluting a racial group's voting power), and in "one person/one vote" cases, e.g., *Reynolds v. Sims*, 377 U.S. 533, 559, 577 (1964) (holding that the seats in a bicameral state legislature must be apportioned on a population basis so that one person's vote is counted equally with another's). Vindication of the right to be fairly represented is also evident in the "ballot access" cases in which would-be candidates assert the voting rights of supporters. See, e.g., *Williams v. Rhodes*, 393 U.S. 23 (1968) (invalidating excessive restrictions on access to the ballot).

<sup>86</sup> See *supra* text accompanying notes 41-42. This is not to suggest that the discussion that follows in the text is inapplicable to the selection of legislators. Quite the contrary. It seems ineluctable (at least to me) that legislative candidates, too, are entitled to be treated as equals in the process by which governmental officers are chosen. I tie this argument to the selection of judges only because the alternative ground (the entitlement of citizens to vote for whom they please) on which the ballot-access cases rest in the legislative context is unavailable with respect to judicial candidates.

<sup>87</sup> The Supreme Court has thus far declined to extend the "one person/one vote" principle to judicial elections. *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (noting that judges serve people but do not represent them), *aff'd*, 409 U.S. 1095 (1973). That is unfortunate. It is true that judges do not represent constituents in the familiar, legislative sense. Yet there is no self-evident explanation for weighting some voters' preferences more than others in a system in which government chooses to

Racial gerrymandering, stacking, staggered terms, numbered places, anti-single-shot rules, and other discriminatory devices now held invalid in legislative elections,<sup>88</sup> albeit because of the burden on minority voters, are invalid in the case of judicial elections for this different reason. On the other hand, some arrangements that are objectionable when employed in legislative elections, may be less vulnerable when used in judicial elections. Multi-member districts provide an example.<sup>89</sup> If judges do not represent constituents in the manner of legislators, the argument for single-member districts, some of which would elect minority candidates, appears to be weakened. Once again, within the framework I have outlined, the constitutional standard is not tied to the desire of voters to elect "their own" but to the more subtle interest of people in being treated as equals by the electoral scheme.<sup>90</sup> Still, it seems clear that if multi-member districts are established for the purpose of frustrating the election of African Americans to office, they deny the equality of blacks and are thus constitutionally flawed.<sup>91</sup>

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employ elections for judicial selection. *Wells*, 409 U.S. at 1096-98 (White, J., dissenting) (arguing that the "one person/one vote" principle should apply since judges are "state officials . . . elected (or appointed) to carry out the state government's judicial functions"); accord *Holshouser v. Scott*, 335 F. Supp. 928, 934-35 (M.D.N.C. 1971) (Craven, J., dissenting) (recalling that judges serve all the people of a state—not simply those who nominate them). Since the argument I want to make does not depend upon the representational model for courts, however, the false step in the "one person/one vote" case causes me no difficulty.

<sup>88</sup> See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (invalidating an at-large voting system); *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (holding racial gerrymandering unconstitutional).

<sup>89</sup> See, e.g., *White v. Register*, 412 U.S. 755, 764 (1973) (invalidating multi-member legislative districts used invidiously to dilute the political power of racial groups).

<sup>90</sup> Of course, the incoming tide raises all boats. The arrival of more African Americans on the bench may well generate greater sensitivity to racial factors in all cases before all judges. Indeed, if I were to focus on the policy implications of increasing the number of black judges, I might well contend for popular elections—in order that blacks might further their own interests in districts in which they are in the majority. Cf. Bennet, *Black Judges*, TRIAL MAG., Jan., 1976, at 4 (reporting on a black judge who insisted that blacks would be more attentive to voters whom they "represent"); Note, *Civil Rights Enforcement and the Selection of Federal District Court Judges*, 21 ST. LOUIS U.L.J. 385 (1977) (reporting research supporting the conclusion that the societal groups from which judges are chosen help to predict their behavior in civil rights cases). In a similar vein, I would expect that an increase in the number of female jurists would have its effect upon judicial behavior. See generally Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988). For a further discussion of judicial elections and sensitivity to racial factors, see *infra* note 102.

<sup>91</sup> For a discussion of recent suits about the use of at-large schemes in judicial elections, see Nat'l Law J., Feb. 20, 1989, at 1, col. 1.

The intellectual reach of this analysis extends to electoral systems that neglect not only racial minorities but any groups of citizens entitled to be treated as equals. Here, as elsewhere, any practical constitutional analysis must focus upon those who have typically been the victims of mistreatment in this society. Only they are likely to suffer the indignation about which we are concerned. The moral significance of governmental action disparaging such groups, moreover, provides a basis for special attention. The constitutional standards applicable to judicial elections must attend, then, to discrimination touching groups whose treatment generally arouses suspicion: racial, ethnic, and language minorities, women, and perhaps some others. In delimiting these groups, it is apparent that we cannot borrow wholesale from the list of classifications identified in the cases as presumptively invidious and thus warranting special scrutiny.<sup>92</sup> For purposes of judicial elections, the range of constitutionally "suspect" classifications within conventional equal protection doctrine is both underinclusive (omitting women, for example)<sup>93</sup> and overinclusive (including resident aliens).<sup>94</sup>

The more fruitful doctrinal referent is the notion of constitutionally "distinctive" groups, which has emerged from decisions regarding the sixth amendment right to jury trials.<sup>95</sup> The Supreme Court has explained that distinctive groups are those the systematic exclusion of which would frustrate the sixth amendment's command that jurors be selected from a cross-section of the community. That cross-section requirement, in turn, rests upon the

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<sup>92</sup> See *supra* note 48 and accompanying text.

<sup>93</sup> See *supra* note 47 and accompanying text. In addition, gay and lesbian citizens have not yet elicited appreciable sensitivity from the Supreme Court and thus have not been heard to claim close scrutiny of legislative policies that affect them as a class. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986) (manifesting substantial insensitivity to the plight of gay citizens before legislative bodies). Yet it is difficult to accept the notion that the Constitution is indifferent to judicial election schemes that deny the equality of homosexuals. See *DEMOCRACY AND DISTRUST*, *supra* note 43, at 161-65 (noting that homophobia can block its own correction by intimidating its victims); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing that courts should recognize homosexuality as a suspect classification for equal protection purposes).

<sup>94</sup> Even if discrimination to the disadvantage of aliens elicits stringent judicial scrutiny when attacked under the equal protection clause, it seems apparent that aliens need not be considered for judgeships if, despite careful review, they can constitutionally be excluded from holding some public posts. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 81 (1979) (permitting public elementary schools to refuse to employ resident aliens as teachers); *Foley v. Connelie*, 435 U.S. 291, 300 (1978) (allowing aliens to be denied employment as police officers). *But cf. Bernal v. Fainter*, 467 U.S. 216, 228 (1984) (invalidating the exclusion of aliens from service as notaries public).

<sup>95</sup> See, e.g., *Duren v. Missouri*, 439 U.S. 357, 364, 367 (1978) (holding that women are sufficiently numerous and distinct that they may not be systematically eliminated from jury panels).

need to ensure impartiality, to maintain public confidence in the criminal process, and to foster a "sharing in the administration of justice" as a "phase of civic responsibility."<sup>96</sup> This last is relevant here. It acknowledges that the harm caused by excluding constitutionally distinctive groups goes beyond any unfairness to the accused; it recognizes that the exclusion threatens the civil duties, and we may say civil rights, of the individuals excluded.<sup>97</sup> The central idea is that public decisions in this constitutional democracy must be made with the interests of all in mind and, accordingly, that the selection of those who will perform public functions cannot disregard citizens for whom those in power have no moral regard—denying those citizens the role to which they are entitled in a system in which the people govern themselves. Constitutional standards for judicial elections must therefore ensure that groups recognized as distinctive within the meaning of the sixth amendment are not excluded.<sup>98</sup>

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<sup>96</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). The impartiality of juries may be compromised, of course, if distinctive groups are excluded and with them "qualities of human nature and varieties of human experience" that "may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (allowing a white defendant to complain that blacks had been excluded from grand and petit juries); see Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986) (discussing the significance of gender to perceptions of morality). In cases like *Peters*, which involved the exclusion of blacks, and *Taylor*, in which the Court initially held that women constitute a distinctive group, this point has self-evident validity. My focus, again, is on all citizens' right to be treated as equals—and the threat to that principle when judicial authority is distributed without regard for groups toward which the powerful are hostile.

<sup>97</sup> It seems plain that the insistence upon including distinctive groups flows not from any desire to impose upon those groups the burdens associated with jury service but to ensure that the members of distinctive groups enjoy the "privilege of participating equally . . . in the administration of justice." *Peters*, 407 U.S. at 499; see Note, Lockhart v. McCree: *Death Qualification as a Determinant of the Impartiality and Representativeness of a Jury in Death Penalty Cases*, 72 CORNELL L. REV. 1075, 1080 (1987) (showing that the cross-section requirement was developed to assure the participation of blacks on juries).

<sup>98</sup> This covers the groups I have identified: racial, ethnic, and language minorities—together with women. The sixth amendment cases have also found people identified by occupation or education to be constitutionally distinctive. See, e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946) (forbidding the exclusion of daily wage earners); *United States v. Butera*, 420 F.2d 564, 571 (1st Cir. 1970) (demanding an explanation for the exclusion of the less educated); see Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1107-08 (1987) (collecting these and other cases). In the context of judicial selection, however, "qualifications" may validly be considered. See *infra* Part IV(B)(1). Age classifications present a borderline case. The weight of authority holds that "young adults" do not constitute a distinctive group for sixth amendment purposes. *Ford v. Seabold*, 841 F.2d 677, 682

The jury trial cases are also helpful in fixing the scope of the constitutional standard for judicial elections. A jury selection scheme meets constitutional standards if it produces a venire that reflects a cross-section of the community.<sup>99</sup> An election scheme is similarly valid if it does not exclude members of distinctive groups from the pool from which judges are taken. It may happen that the number of judges actually elected from such groups is not proportionate to the size of the groups in the community—much in the way that a single petit jury may not include members of groups represented in the community and in the venire.<sup>100</sup> Nevertheless, an electoral scheme that repeatedly fails to place candidates from distinctive groups on the bench is, of course, ripe for close examination to determine the true reason for its existence.<sup>101</sup>

Of course, candidates from distinctive groups may suffer systematically at the polls not only because the election scheme in which they participate is flawed but because individual voters take distinguishing characteristics into account in voting. Yet we do not hold government officials to account constitutionally for prejudices in the public at large. Instead, we typically approach the racially determined voting problem at the flank, making bloc voting a trigger for forcing government officials to make adjustments in

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(6th Cir. 1988) (collecting illustrative precedents). One may fairly argue that the routine exclusion of relatively youthful men and women from the bench would invoke the kind of constitutional concerns we have in mind here. Yet, I am content that schemes fixing specific age limits that exclude only the very young can pass muster as establishing reasonable "experience" standards. *See infra* Part IV(B)(1). In *Ford*, for example, the group in issue was composed of persons aged 18 to 29. While the resulting restriction of jurors (and by analogy judges) to candidates "over thirty" gives some initial pause to members of my generation, I confess I am more comfortable now than I once was with the notion that age and experience do not always skew one's values for the worse.

<sup>99</sup> *Lockhart v. McCree*, 476 U.S. 162, 173-75 (1986).

<sup>100</sup> The analogy between jury selection schemes and judicial elections is flawed in this respect. In the one, the appearance of minorities on a panel is subject to statistical prediction, and if, for example, too few women are selected over time, a constitutional objection is immediately apparent. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 366-67 (1979) (invoking statistics to show that women were systematically excluded from jury pools). In the other, candidates are exposed to the predilections of the electorate.

<sup>101</sup> I have not engaged familiar arguments regarding the extent to which evidence of the discriminatory effects of governmental policies demonstrates a purpose to mistreat the victim class. Indeed, I have suggested that the Voting Rights Act should readily be called into service in judicial elections without pausing over its departures from baseline constitutional principle. Suffice it to say that any serious attempt to enforce the Constitution in this context would at least embrace existing means of discovering a refusal to treat some citizens as equals—and would probably press governmental authorities harder on why it is, if it is, that members of distinctive groups are not elected.

something for which they *are* responsible—the electoral process. This is the way in which we cope, or attempt to cope, with bigotry in the polling booth when executive and legislative candidates stand for office. It is also the way in which we should enforce, or attempt to enforce, constitutional requirements for the election of judges. Apart from the abandonment of judicial elections, a course I would certainly approve but cannot insist is constitutionally mandated, there is no other choice.<sup>102</sup>

## 2. Judicial Appointments

In jurisdictions in which judges are appointed, including the federal system, the constitutional requirement that judicial selection must accord equal

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<sup>102</sup> Our inability effectively to deal in substance with racism at the polls may argue for abandonment of judicial elections in favor of appointive schemes more susceptible to constitutional review. But two points. First, there *is* a respectable body of opinion to the effect that minority judges are more likely to be selected in the South by the election schemes still in use there, at least so long as those schemes are tempered by the procedural adjustments discussed in the text. There is a spirited debate in civil rights circles regarding the extent to which the interests of black people may best be served: (1) by retaining judicial elections in hopes that blacks, aided by the Voting Rights Act, may be able to elect black judges; or (2) by pursuing reform schemes under which appointive authorities, who are increasingly responsive to the black electorate, put more blacks on the bench. Compare Mumford, *Impartial Justice Comes First When Selecting Judges*, Jackson Clarion-Ledger Daily News, Mar. 29, 1987, H-1 (advocating adoption of an appointive scheme in Mississippi) with *State Judge Challenges May Be Next Voting Frontier*, VOTING RTS. REV. 1 (May, 1987) (indicating support for litigators attempting to invoke the Voting Rights Act in judicial elections) and Coalition of Concerned Black Americans, *A Preliminary Report of the Experiences of the Minority Judiciary in the City of New York*, 18 HOW. L.J. 495, 503 (1975) (reporting that black and hispanic judges in New York “may very well be in support of an elective system”). See generally Nat’l Law J., Feb. 20, 1989, at 1, col. 1-2. It makes good sense that those whose objective is to advance the interests of African Americans should seriously consider whether properly orchestrated elections might be a more effective vehicle than schemes leaving the choice to whites already in executive office.

Second, laying aside the practicalities of eliminating judicial elections, the theory offered to justify change may prove too much to handle. The fatal flaw in judicial elections (the bigotry of individual voters who routinely support white males and ignore candidates from constitutionally distinctive groups) is repeated in all other elections, in which executive and legislative officers are chosen. We may have the luxury in the context of judicial selection to prefer appointive schemes over elections, but it can no more be claimed that the election of judges is itself unconstitutional than it can seriously be argued that the election of county supervisors, mayors, and governors is similarly invalid. *But see* Redish & Marshall, *supra* note 38. At some point in a democracy, moreover, the Constitution must actually command elections—even when many participants may vote their prejudices. *But cf.* Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988) (contending that individual participants in plebiscites are unlikely to ignore the interests and concerns of others).



concern and respect to citizens from distinctive groups controls both the nomination of candidates (typically the executive's assignment) and the approval of nominees (typically a legislative body's assignment). The president or a governor cannot exclude from consideration members of groups to which she or he is hostile. Nor can the Senate or an analogous state body approve nominees chosen in that way. While the number of distinctive group judges actually seated may not be proportional to the relevant group's population in the community, the Constitution mandates that the nomination and approval machinery provide the opportunity for members of all such groups to be selected.<sup>103</sup>

In the case of judicial appointments, however, the prohibition on exclusionary policies is insufficient to ensure conformity with the Constitution. Unlike election systems, in which aspiring candidates can be counted upon to reveal their availability to the public, appointment schemes depend on the executive's efforts to develop a list of potential judges. It is too easy for insensitive presidents or governors to miscast their nets and thus miss candidates from distinctive groups. If that should occur, it is unrealistic to think that other participants in the appointment apparatus, namely legislative bodies with authority to pass on nominations, or even reviewing courts, could catch the executive's constitutional wrong. Lacking the facilities necessary to discover candidates omitted from the list, they would almost certainly accept the executive's assurances that distinctive groups were not neglected. Accordingly, another procedural safeguard against discriminatory selection is constitutionally mandated—one that substitutes, in effect, for the check supplied in election schemes by candidates' opportunity to file for office.

Here again, the constitutional standards we are developing can fruitfully borrow from an adjacent field. The challenge at hand is to fashion a mechanism for identifying judicial candidates from constitutionally distinctive groups that may otherwise be neglected. That same difficulty arises in employment cases, in which ordinary solicitations habitually fail to generate applications from minority workers. In that context, of course, we have developed a range of techniques, coming under the "affirmative action" title, which promise a more thorough search for talent.<sup>104</sup> If the constitutional requirement that the equality of distinctive groups be respected is to be taken seriously, similar efforts are essential in judicial appointment systems. There is nothing so startling in this. President Carter made affirmative action an integral part of his innovative scheme for nominating candidates

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<sup>103</sup> In many appointment schemes, the executive is aided by a nominating commission. The same constitutional standards attach to the work of such commissions; they require no separate attention.

<sup>104</sup> I refer here only to special efforts to identify and attract minority candidates and not to more controversial attempts to hire more such workers by taking their status into account in making substantive decisions.

for the circuit courts of appeal.<sup>105</sup> It appears, however, that Carter did not pause to wonder whether he was constitutionally obligated to do so.<sup>106</sup>

The claim that appointive authorities must establish special plans for the recruitment of judicial candidates from distinctive groups is open to the objection that it mistakes what may be an appropriate backward-looking

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<sup>105</sup> Exec. Order No. 11972, 42 Fed. Reg. 9659 (1977) (establishing the U.S. Circuit Judge Nominating Commission); Exec. Order 12059, 43 Fed. Reg. 20949, 20950 (1978) (specifying that the Commission should seek out qualified women and members of minority groups as potential judicial nominees). Carter was also explicit on the issue when he signed the Omnibus Judgeship Bill later in his term: "This act provides a unique opportunity to redress . . . [a] disturbing feature of the Federal Judiciary: the almost complete absence of women or members of minority groups." Appointments of Additional District and Circuit Judges, 14 WEEKLY COMP. PRES. DOC. 1803 (Oct. 23, 1978).

This is not to say that the particulars of Carter's plan meet or in any way establish the constitutional standard. Indeed, there is reason to doubt that the mechanism he developed was adequate to its task. At the outset, for example, Attorney General Bell insisted upon naming prominent white male lawyers with whom he was personally acquainted to chair the Commission's panels in each judicial circuit. While minority and women's organizations were asked to suggest candidates for membership on the panels, very few of those proposed were accepted. Instead, the panels were staffed primarily by lawyers and active members of the president's party. In operation, the panels often failed to solicit names from minority communities with the necessary vigor. Votes on names to be submitted to the president, moreover, were sometimes taken by secret ballot—thus allowing panelists to slight the Commission's stated criteria and to support personal choices instead. At least initially, the panels rarely recommended minority and women candidates. Nevertheless, all the panels included minority members; in some instances, women were in the majority. And there is no doubting that, in the end, the Commission generated many more candidates from constitutionally distinctive groups than had any nominating procedure in the past.

President Carter deserves enormous credit for nominating women to circuit judgeships at the rate of 41% and for nominating minorities at the rate of 47%. L. BERKSON & S. CARBON, *FEDERAL JUDICIAL SELECTION DURING THE CARTER ADMINISTRATION, VOL. I: THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* 41, 44, 66, 120, 143, 152 (1979); *see also* L. BERKSON, S. CARBON & A. NEFF, *A STUDY OF THE U.S. CIRCUIT JUDGE NOMINATING COMMISSION: EXECUTIVE SUMMARY* 23 (1979) (pointing out that at the time of Carter's inauguration only one of 97 active federal circuit judges was a woman and that the new president named seven more within three years). Of course, other presidents have also tried to diversify the judiciary. *Cf.* N. MCFEELEY, *APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY* 136 (1987) (reporting that President Johnson "attempted" to appoint women and minorities to the federal bench); N.Y. Times, Oct. 31, 1987, at 1, 32, col. 1 (reporting that President Reagan's advisors discussed the likelihood that Judge Douglas H. Ginsburg's being Jewish would enhance his chances of confirmation).

<sup>106</sup> He was.

remedy for an affirmative constitutional mandate. Concededly, the race-conscious schemes about which courts have been concerned in recent years have been remedial in nature.<sup>107</sup> Yet when governmental action commonly produces results inconsistent with what would be anticipated if only legitimate objectives were in view, the absence of efforts to reach more deeply into the population is plainly evidence that, in truth, impermissible attitudes are at work.<sup>108</sup> The difference between schemes that mistreat a constitutionally distinctive group and schemes that merely fail to avoid mistreatment is often paper thin. And when the selection of the judges who will make future constitutional judgments hangs in the balance, it is not too much to propose that those in power give solid assurances that constitutional standards are met.

The structural framework within which judicial appointments are made offers further justification for demanding a selection process that identifies candidates from distinctive groups. For example, the Senate's authority to veto presidential nominations for the Supreme Court provides an occasion for the Senate to ask the president to demonstrate the validity of the nomination process in advance of Senate action. If the Senate wishes to demand that the president employ nomination procedures that actually produce the names of minorities and women, there is no constitutional impediment and much constitutional warrant for refusing to consider nominations developed in any other manner.<sup>109</sup> This point, of course, puts pressure on any assumed distinction between the president's constitutional obligations standing alone and the executive's practical, political tasks in light of Senate demands. Given the Senate's constitutional role in Supreme Court appointments, the significance of any such distinction is elusive. I will return to this theme in Part V, when I take up the enforcement of constitutional standards for the selection of judges.

#### B. *Substantive Standards*

I turn now to substantive standards for judicial selection, that is, standards guiding the inquiries that must be made regarding individual candidates once they have been identified consistent with the procedural standards just

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<sup>107</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (invalidating a local "set aside" plan for minority contractors); *United States v. Paradise*, 480 U.S. 149 (1987) (affirming a remedial promotion plan); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (invalidating a remedial layoff program).

<sup>108</sup> Cf. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977) (explaining that a statistical imbalance can be evidence of purposeful race discrimination); *International Bros. of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20 (1977) (discussing the probative significance of statistical evidence as a tell-tale sign of purposeful discrimination in violation of Title VII).

<sup>109</sup> Cf. *Fullilove v. Klutznick*, 449 U.S. 448, 449 (1980) (approving a congressionally enacted "set aside" plan).

discussed.<sup>110</sup> Three broad headings capture most of the questions that arise: (1) the ostensibly unexceptional matter of candidates' "qualifications" for judicial office; (2) the extraordinarily controversial business of assessing candidates on the basis of predictions regarding their positions on particular legal issues; (3) the role of candidates' ideological make-up as a factor in judicial selection. These matters bear on the election of candidates as well as on the nomination and approval of candidates in appointive schemes. They also bear on both candidates' selection and their rejection—at the polls or by potential nominating authorities or oversight bodies. Nonetheless, in developing the substantive constitutional standards that *must* be respected in the evaluation of judicial candidates, I treat appointive schemes as the norm and characterize factors in the negative—as valid bases for refusing to place candidates on the bench.<sup>111</sup>

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<sup>110</sup> In at least one respect, there is the potential for tension between what I call procedural and substantive standards. On the one hand, I have argued that judicial selection schemes are procedurally flawed if they fail to take account of the interests of all citizens. In particular, I have maintained that members of constitutionally distinctive groups must be accorded a fair opportunity to be chosen as judges. In this Section, on the other hand, I insist that some points of view held by judicial candidates disqualify them from service on the bench. Yet, to the extent citizens who hold such disqualifying views are ignored in the selection process, and certainly to the extent the set they comprise can be assimilated to something constitutionally distinctive, the enforcement of substantive standards appears to run full tilt into the procedural standards I have just outlined. The budding conflict is inconsiderable, however. Procedural constitutional standards can hardly provide a vehicle for frustrating substantive standards. Would-be judges who hold disqualifying ideologies are *not* distinctive in the constitutional sense I mean. See *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (declining to consider "groups defined solely in terms of shared attitudes" to be "distinctive" for purposes of a criminal defendant's right to trial by a jury chosen from a fair cross-section of the community); cf. *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (finding no establishment clause violation in a benefit to which citizens were entitled under the free exercise clause). The point of excluding candidates with certain views from the judiciary is that such exclusions can and, indeed, must be enforced—constitutionally. The point of giving special attention to members of "constitutionally distinctive" groups is that such groups, defined in the equal protection and trial-by-jury contexts, are the most likely to be barred from power by unchecked majoritarianism. All this said, I would defend the interrogation of Judge Daniel A. Manion regarding his relations, if any, with the John Birch Society. See *Confirmation Hearing on Daniel E. Manion: Hearings Before the Senate Comm. on the Judiciary on Appointments to the Federal Judiciary and the Department of Justice*, 99th Cong., 2d Sess. 229-35 (1986); cf. *Nomination of Felix Frankfurter: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary on the Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court*, 76th Cong., 1st Sess. 108-11 (1939) (reporting questions put to Frankfurter regarding his affiliation with the American Civil Liberties Union).

<sup>111</sup> For a discussion of standards to be considered by the public in evaluating judicial candidates in retention elections, see Thompson, *Judicial Independence*,

### 1. Judicial "Qualifications"

Formal qualifications for judicial office fixed by law invariably cover no more than age, citizenship, domicile, and experience.<sup>112</sup> From that baseline, the American Bar Association advances only to the suggestion that judges should be "persons of integrity, competence, and suitable temperament."<sup>113</sup> Appearances necessitate that those with authority to name judges proclaim that their chief criteria are "merit" and "quality."<sup>114</sup> Yet the genuine content of these "qualifications" begs for explanation. After a less-than-scientific thumbing of available materials, I offer this check list of the matters into which appointive authorities are commonly urged to inquire: integrity, intelligence, education, experience, stamina, temperament, and competence.

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*Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 812 (1986).

<sup>112</sup> See generally L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1980). But see Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 201 (1987) (recalling that the Constitution includes no such formal requisites).

I do not address in this discussion the requirement that judges be disinterested in the subject of particular cases. Bias and prejudice at that level are the stuff of rules governing the disqualification of sitting judges. Of course, there is a relationship between appropriate standards of impartiality in individual cases and standards for judicial selection in the first instance. Cf. Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 257-59 (1987) (arguing that a judge's racial prejudice should disqualify him or her in a case in which race is a factor); see also Resnik, *supra* note 90 (suggesting from a feminist point of view that the very idea of impartiality is flawed and that a new perspective on disengagement is needed with respect to both judicial selection and disqualification).

<sup>113</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 8-6 (1986). Essayists contribute lists of admirable attributes. See, e.g., Rosenberg, *The Qualities of Justices—Are They Strainable?*, in *JUDICIAL SELECTION* 1, *supra* note 36. Aristotle demanded four virtues in judges: justice, temperance, prudence, and fortitude. Aristotle, *Ethics*, in 9 THE WORKS OF ARISTOTLE, bk. 5, ch. 4 (W.D. Ross trans. 1925), cited in Noonan, *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1127 (1987); see also Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1184, 1199 (1988) (proposing that candidates for the Supreme Court should exhibit the "right moral instincts"); A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION 61-63 (1974) (reporting that mental and physical health are important criteria of selection), quoted in P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 14 (1980).

<sup>114</sup> See, e.g., Attorney General's Memorandum on Judicial Selection Procedures, March 6, 1981, reprinted in Stiegler, *Selecting Federal Judges During the Reagan Administration*, 64 JUDICATURE 427, 428 (1981) (insisting that the Attorney General and Senate leadership were committed to evaluating federal judges on the basis of merit and quality).

The first five present no serious question—practical or constitutional. Dishonest, dense, poorly-educated, inexperienced, sickly men and women may well make poor judges. On this we can agree on the whole, albeit some of us would regard want of a law degree or substantial experience in legal practice rather less egregious than other liabilities.<sup>115</sup> Of course, the weight these factors should be given and their implication for individual candidates are potentially controversial matters.<sup>116</sup> It is sufficient nonetheless to say

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<sup>115</sup> See Noonan, *supra* note 113, at 1122-24 (recalling that some of our most respected jurists did well enough without formal legal education). Fred Schauer may well be right. Judges require technical competence primarily in order to keep "easy" cases out of the courts altogether. When they are asked to decide difficult cases that genuinely can lay claim to judicial resolution, judges need something quite different—"skills, perspectives [and] talents" that may be found as readily in non-lawyers. Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1732 (1988).

While President Carter's female and minority nominees tended to be less experienced than his white male nominees, the hard data make it "difficult, if not impossible" to contend that Carter's affirmative action policy diluted the "quality" of the federal bench. Slotnick, *Lowering the Bench or Raising it Higher? Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 297 (1983); Goldman, *Should There be Affirmative Action for the Judiciary?* 62 JUDICATURE 488, 492-93 (1979) (listing many eminent minority and female judges brought to the bench in part because of affirmative action); cf. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982) (contending that affirmative action can fruitfully be invoked in filling upper level positions).

<sup>116</sup> In Judge Haynsworth's case, for example, opinions were divided over the nature and extent of the nominee's relations with a company doing business with a firm involved in litigation before him and, more important, over the significance of those alleged relations for the confirmation question. Compare *Clement F. Haynsworth Jr.: Hearings before the Senate Comm. on the Judiciary on the Nomination of Clement F. Haynsworth, Jr., to be Associate Justice of the Supreme Court of the United States*, 91st Cong., 1st Sess. 489 (1969) [hereinafter *Haynsworth Hearings*] (testimony of William Pollock, President, Textile Workers of America) charging that Judge Haynsworth had significant financial interests in the company) with *Haynsworth Hearings*, *supra*, at 38 (statement of Senator Hollings) (insisting that Haynsworth's interests in the firm were "remote"). Justice Brandeis's nomination is the most famous illustration of senatorial inquiry into the "integrity" issue in the face of conflicting testimony. See generally *Nomination of Louis D. Brandeis: Hearings before the Senate Comm. on the Judiciary on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States*, 64th Cong., 1st Sess. (1916).

Judgments regarding the significance of these questions may also vary according to the kind of court candidates hope to serve. See Jones, *The Trial Judge—Role Analysis and Profile*, in *THE COURTS, THE PUBLIC AND THE LAW* EXPLOSION 124, 140 (1965) (discussing the requirements for being a trial judge); SENATE COMM. ON THE JUDICIARY, NOMINATION OF GEORGE HARROLD CARSWELL, S. EXEC. REP. NO. 14, 91st Cong., 2d Sess. 13 (1970) [hereinafter *CARSWELL NOMINATION*] (Senators

that shortcomings in these terms can and should be disqualifying without resort to the Constitution. So long as such standards are reasonably stated and applied, and do not mask illegitimate goals, they are valid.<sup>117</sup>

The notion that candidates should manifest a "judicial temperament" is more unruly. On the one hand, "temperament" may refer to "prudence"<sup>118</sup> or Solomonic justice.<sup>119</sup> If either of these captures the meaning of judicial temperament, then it will be revealed through inquiries into such things as integrity and experience. At any rate, such personality traits as these, however important they may be for success on the bench, do not ignite constitutional concerns. If, on the other hand, temperament refers to the capacity and inclination to treat litigants as equals, and in a broader sense to keep the morally equivalent interests of all citizens in view as legal paraphernalia are interpreted, then candidates who lack judicial temperament are constitutionally barred.<sup>120</sup> This is why racists are not fit for service on the bench.<sup>121</sup>

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Bayh, Hart, Kennedy, and Tydings) (contending that Judge Carswell's record failed to manifest such "achievement and eminence" to warrant his being seated on the nation's highest tribunal).

<sup>117</sup> See *supra* notes 45-51 and accompanying text.

<sup>118</sup> See Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985); cf. Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection and Accountability*, 61 S. CAL. L. REV. 1617, 1650-55 (1988) (suggesting that judicial qualifications should take account of the value choices that judges will be called upon to make).

<sup>119</sup> See D. JACKSON, JUDGES 7 (1974) (crediting Geoffrey Hazard with the reference).

<sup>120</sup> While Judge Carswell's detractors typically focused on whether he was competent for service on the Supreme Court, some critics faulted him for lacking "judicial temperament" and meant by that that he was hostile to litigation on behalf of racial minorities. See CARSWELL NOMINATION, *supra* note 116, at 17. Similarly, Judge Bork was challenged for an alleged insensitivity on racial issues. Compare A.F.L.-C.I.O. Vows to Oppose Bork Nomination, N.Y. Times, Aug. 18, 1987, at A16, col. 1 (quoting a labor union statement charging that Judge Bork had "never shown the least concern for working people, minorities, the poor") with Bork Says He Left Club that Barred Women, Boston Globe, Aug. 11, 1987, at 10, col. 4 (reporting that Judge Bork claimed to have signed a petition supporting the admission of women to membership in New York's Century Association and to have resigned when he learned that the Association's males-only policy might violate state law).

<sup>121</sup> The Senate has occasionally rejected nominees for the federal bench at least in part in response to concerns about their respect for racial minorities. The most famous case may be the struggle over President Hoover's nomination of Judge John J. Parker. NAACP Secretary Walter White expressed his organization's outrage that Parker had made explicitly racist statements in a speech before the Republican state convention in North Carolina. See *Confirmation of Hon. John J. Parker to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary on the Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States*, 71st

Professional "competence" is more refractory still. Apart from candidates' education, experience, and temperament, their competence bespeaks expertise in handling legal materials—in finding relevant statutes and precedents, in deciphering their esoteric language, and in bringing written rules to bear on current problems. There is more in this than a merely conservative notion of appropriate judicial behavior. This is the technician model.<sup>122</sup> Judges, to be sure, require these common skills if they are to perform well, and candidates may therefore be examined to ensure that they grasp the rudiments of legal practice. If, however, appointive authorities look upon candidates' technical skills as not merely necessary but also as sufficient, they engage grave constitutional risks. The law with which judges must grapple is not a matter of "fact," such that courts need only discover "what legal institutions have decided in the past."<sup>123</sup> In constitutional cases, judges examine legislative and executive actions in light of our commitment to equality, distilled from our cultural vision of the public good. To consider only technical competence is to ignore the constitutional command under which judges labor as they interpret legal materials in this constitutional democracy.<sup>124</sup>

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Cong., 2d Sess. 74 (1930) (statement of Walter White). Despite that record, it appears that Parker's defeat was due in large part to opposition from organized labor on other grounds. See Dubois, *The Defeat of Judge Parker*, 37 CRISIS 225, 248 (1930) (ascribing Parker's failure to a new "union of forces" between liberals and labor unions on the one hand and blacks on the other); see Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 567-72 (1986) (tracing Parker's subsequent career as a circuit judge—and identifying evidence that he was, indeed, insensitive to racial minorities).

Plainly, the Senate has recently conducted searching investigations of nominees suspected of antagonism to racial minorities. See, e.g., *Nomination of Jefferson B. Sessions III, to be U.S. District Judge for the Southern District of Alabama: Hearings before the Senate Comm. on the Judiciary on the Nomination of Jefferson B. Sessions III, of Alabama, to be U.S. District Judge for the Southern District of Alabama*, 99th Cong., 2d Sess. (1987) (containing several statements and exchanges in which the candidate's attitudes regarding blacks were explored). Of course, criticisms of Chief Justice Rehnquist's alleged harassment of minority voters in Arizona, and his notorious memorandum to Justice Jackson concerning school segregation, have received widespread attention. See SENATE COMM. ON THE JUDICIARY, NOMINATION OF WILLIAM H. REHNQUIST, S. EXEC. REP. NO. 16, 92d Cong., 1st Sess. 24-25 (1971) (explaining the views of Senators Bayh, Hart, Kennedy, and Tunney).

<sup>122</sup> See, e.g., Garwood, *Democracy and the Popular Election of Judges: An Argument*, 16 SW. L.J. 216, 229 (1962) (arguing that judges, like admirals and university presidents, are experts).

<sup>123</sup> LAW'S EMPIRE, *supra* note 8, at 31.

<sup>124</sup> A distinction is commonly drawn in this connection between judges who sit on courts of last resort, particularly justices of the United States Supreme Court, and lower court judges. It is true that judges who are infallible because they are last and



## 2. Issue-Regarding Predictions

Candidates for judicial office since Frankfurter have routinely declined to discuss their likely positions on particular legal issues—at least in public.<sup>125</sup> Officials in a position to influence appointments have indulged this reticence, at least in public, for two ostensible reasons.<sup>126</sup> First, inquiries into candidates' predictable votes in hypothetical cases may threaten the independence of the judiciary. Appointive authorities, who occupy positions in either the executive or legislative branches, overreach their proper spheres if they attempt to influence outcomes in disputes before the judicial branch by conditioning the appointment of candidates on promises to cooperate in

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who have great flexibility in correcting their own past "errors" fit more precisely the model described in the text than do inferior court judges constrained to adhere to precedents handed down from above. Yet the extent to which lower courts are genuinely *bound* by higher court precedents in close cases may be overstated. Only rarely is a precedent truly on "all fours" with the case at bar, and more rarely still can the lower court anticipate that its decision will be reviewed—given the physical limits of most appellate courts. Indeed, there is ample evidence that lower court judges feel free to treat precedents as merely elements of the rich mix of materials that must be considered in resolving a new dispute. The resulting state of affairs may be objectionable to some, unsettling to many, but it seems only consistent with the nature of judicial behavior.

<sup>125</sup> Cf. *Nomination of Felix Frankfurter: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary on the Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court*, 76th Cong., 1st Sess. 107 (1939) (insisting that responses to questions about substantive issues would promote neither the interests of the nomination process nor the Court).

<sup>126</sup> See, e.g., *Bork Says He Left Club that Barred Women*, Boston Globe, Aug. 11, 1987, at 10, col. 4 (reporting Judge Bork's insistence that President Reagan's advisors had not asked about his position on "any case or legal issue or question" that could come before the Court). But cf. Roberts, *Reagan Gets His Chance to Tilt the Court*, N.Y. Times, June 28, 1987, § 4, at 1, col. 1 (quoting Senator Leahy accusing President Reagan of attempting to "change" the Court's position on abortion and a range of other vexing issues). During the hearings on Justice Stewart's nomination, Senator Hennings attempted to forestall questions about Supreme Court precedents by raising a point of order. Senator Eastland overruled that idea in favor of leaving it to the nominee to decide whether to answer such questions. That, of course, is now the accepted rule. See Powe, *The Senate and the Court: Questioning a Nominee*, 54 TEX. L. REV. 891, 892 (1976). Yet some senators occasionally persist. The most notorious example is the extensive questionnaire that Senators John East and Jeremiah Denton sent to Andrew L. Frey, a nominee for the United States Circuit Court of Appeals for the District of Columbia. See D. O'BRIEN, *supra* note 22, at 107-11; see also Wermiel, *Bork's Abortion Views Looming Larger As Problem in High Court Confirmation*, Wall St. J., July 6, 1987, at 2, col. 1 (reporting that Senator Packwood threatened to filibuster the Bork nomination if Judge Bork declined to support precedents invalidating state statutes restricting abortion).

controversial cases.<sup>127</sup> Second, candidates and appointive authorities may wish to avoid prejudging issues. Projected views would necessarily be abstracted from actual disputes in which the relevant legal issues might arise and thus would forfeit the benefits of concrete fact patterns, careful briefing, and, on multi-judge courts, collegial deliberations. By this account, judges perform best when they are faced with practical circumstances that establish the field in which legal principles operate—now narrowing, then extending, the scope of the judicial lawmaking required.<sup>128</sup> In a similar vein, effective advocacy and informal consultations with colleagues also promise a better brand of judicial action.<sup>129</sup> Finally, candidates for the bench may reasonably wish to avoid public statements they may have to withdraw when, in the light of argument in actual cases, they change their minds.

These explanations sound familiar constitutional themes—"separation of powers" and the confinement of (federal) courts to genuine "cases or controversies."<sup>130</sup> Yet on close examination neither explanation justifies the common hesitancy to press candidates on their views about legal questions. The threat to judicial independence would be real if, in fact, authorities in the other branches could routinely use their roles in the judicial selection process to control the future course of constitutional law.<sup>131</sup> The great range of issues presented to courts, however, together with the length of a judge's

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<sup>127</sup> Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (apparently standing *inter alia* for the proposition that Congress cannot specify the outcomes to be reached by federal courts considering legal questions).

<sup>128</sup> See Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 303-04 (1979) (arguing that judicial decisionmaking should be limited to the legal questions necessary to the resolution of a dispute).

<sup>129</sup> *Id.* at 311-12 (extolling the virtues of advocacy by interested parties). See generally Kornhauser & Sager, *supra* note 42 (arguing that collective decisionmaking can improve a court's performance).

<sup>130</sup> When Justice Fortas returned to the Senate Judiciary Committee for hearings on his nomination to succeed Earl Warren as Chief Justice, he made the separation-of-powers point explicitly in response to Senator Thurmond's questions regarding Warren Court precedents. With respect to cases in which he himself had participated, Fortas insisted that federal judges, like members of Congress protected by the speech and debate clause, should not be questioned about their behavior on the bench "in any other place." *Nominations of Abe Fortas and Homer Thornberry: Hearings before the Senate Comm. on the Judiciary on the Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States*, 90th Cong., 2d Sess. 185 (1968) [hereinafter *Fortas and Thornberry Hearings*]; see U.S. CONST. art. I, § 6. But see Note, *Must a Supreme Court Justice Refuse to Answer Senators' Questions?*, 78 YALE L.J. 696 (1969) (faulting these explanations for Fortas's failure to answer questions).

<sup>131</sup> Cf. U.S. CONST. art. I, § 9, cl. 3 (prohibiting bills of attainder).

tenure on the bench, render that prospect unlikely.<sup>132</sup> On the whole, inquiries into candidates' own predictions of their positions in hypothetical cases may be reconciled with appointive authorities' entirely appropriate exploration of ideological outlook, to which I will turn in a moment. Indeed, and in this I do not mean to be unsympathetic, the real reason that judicial candidates may wish to avoid such inquiries is that they fear public embarrassment should their answers reveal ignorance or sloppy thinking—however understandable in the circumstances.<sup>133</sup> The notion that potential judges require concrete disputes, argument, and collegial deliberations before giving their views may also be overdone. The issues about which candidates are most likely to be asked have typically arisen in actual cases in the past (providing the necessary factual backdrop) and have been debated in various professional and public circles for years.<sup>134</sup> To pick from common illustrations, it strains credulity to suggest that presidential nominees for the Supreme Court need these trappings of the judicial craft before discussing their views on the validity of state-sponsored racial segregation or blanket criminal penalties on abortion.<sup>135</sup>

There is, however, another, decidedly constitutional, explanation for the hesitancy to broach candidates' own expectations of their positions on legal issues. The notion of selecting judges because they are inclined to decide cases as the faction in power wishes bespeaks the representational model.

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<sup>132</sup> Professor Friedman has argued that it is impossible to predict a judge's long-term ideological views from her ideology at the time of her nomination. See Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 91 YALE L.J. 1283, 1291 (1986).

<sup>133</sup> It should be recalled that the justices of the Supreme Court participate in the formulation of the federal rules and thus apparently approve the constitutionality of amendments. No one seriously proposes that it would be particularly embarrassing thereafter, in a concrete case, for the Court to find a constitutional difficulty not detected when a rule was promulgated.

<sup>134</sup> See, e.g., *Fortas and Thornberry Hearings*, *supra* note 130, at 181 (reporting questions put to Abe Fortas by Senator Thurmond).

<sup>135</sup> For example, Judge Bork's widely known views on these issues generated fierce opposition from civil rights and abortion rights groups and played a critical role in the confirmation hearings. See Rosenthal, *Bork Fight Gives Abortion Rights Convention Something to Shout About*, N.Y. Times, July 13, 1987, at A12, col. 1 (reporting that Bork's nomination enraged abortion rights advocates); Witcher, *NAACP Convention Tackles Bork*, *New Agenda*, Boston Globe, July 12, 1987, at 3, col. 1 (reporting NAACP opposition to Bork); Greenhouse, *The Bork Nomination: In No Time at All, Both Proponents and Opponents Are Ready for Battle*, N.Y. Times, July 9, 1987, at A24, col. 1 (reporting the speedy mobilization of Bork opponents and supporters); Dionne, *Abortion, Bork and the '88 Campaign*, N.Y. Times, July 8, 1987, at A20, col. 1 (reporting on the political implications of Bork's views on abortion). But see Nagel, *A Comment on Democratic Constitutionalism*, 61 TUL. L. REV. 1027, 1032 (1987) (explaining that senators may hesitate to ask candidates about their views for fear of appearing to be "politicizing the confirmation process").

Even if it is assumed that a governor or president, elected by popular vote, represents a majority of the citizenry,<sup>136</sup> his or her majoritarian sentiments may not be vindicated consistent with the Constitution without regard for the equality of constitutionally distinctive groups. Simply put, judicial appointments are unconstitutional if made in furtherance of the appointing authority's preferences alone. This is not to say that isolated references to candidates' opinions on debatable points of law are necessarily constitutionally damning. It is to say that an appointive authority's selection of particular candidates for the purpose of obtaining judicial decisions that neglect the constitutional requirement of equal concern and respect provides an occasion not only for permissible political opposition but for mandatory constitutional objection.

### 3. Ideology

The truly vexing question regarding substantive standards for judicial selection is the role of candidates' "political philosophy" or "ideology." In the main, the fuss seems to be about judicial candidates' perspective on the world manifest in the values they carry about, the baggage of their personalities.<sup>137</sup> An individual's perspective in this sense is properly labeled ideology—the kind of value-laden framework that each of us brings to bear on the data of daily life as a means of interpreting evidence and making sense of it.<sup>138</sup> I will divide the discussion to follow into two parts: the *permissibility*

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<sup>136</sup> Of course, no one *would* indulge any such assumption but for purposes of argument. The electoral college to one side, the president never enjoys the manifest support of a majority of *citizens* and often lacks support from even a majority of *voters*. More to the point, the mere election of any officer on the strength of inscrutable voter behavior hardly demonstrates majority sentiment regarding any single issue with which the officer deals.

<sup>137</sup> One could attempt a distinction between candidates' *general* ideology and the part of that world view that bears upon their potential behavior as judges. I am not sure any such distinction can be drawn, such that anyone's perspective on the judicial role can be discussed seriously apart from the more general mind-set I have identified.

<sup>138</sup> The popular literature slips loosely between the terms "political philosophy" and "ideology," ignoring the implications of each. See, e.g., Johnston, *Reagan to Select Nominee for Court Within Two Weeks*, N.Y. Times, June 29, 1987, at A14, col. 1 (quoting Attorney General Meese denying that President Reagan would employ an "ideological test" but conceding that the President would base his choice on candidates' "view of the constitutional role of the judiciary"); see also J. SIMON, *IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA* (1973) (suggesting that President Nixon's nominees for the Supreme Court possessed similar political philosophies but very different judicial ideologies). I distinguish "politics," which concerns the competition for power, and "ideology," which touches world view—a judgmental frame of reference that is not affected by accumulated evidence but rather is pressed *upon* data by the interpreter. I do not refer to the

of considering ideology in the selection of judges and the constitutional responsibility on the part of appointive authorities to take ideology into account.

The range of permissible reference to judicial candidates' ideology is broad. It has been historically<sup>139</sup> and doubtless will be in the future<sup>140</sup>—without constitutional objection. Appointive authorities may routinely favor members of their own political parties.<sup>141</sup> In addition, they may and probably should trim lists of would-be judges at the extremes, settling upon candidates near the mainstream. Certainly in the federal system, the Constitution contemplates much tugging and pulling at the level of ideology as the president and the Senate spar with one another over the best choices to staff the third branch of the national government. A shadow set of arrangements in state systems can be expected and appreciated in a similar fashion. These machinations can raise constitutional concerns, of course,<sup>142</sup> but the sub-

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Marxian understanding of "ideology," which has the disparaging connotation of a delusional set of beliefs that, when embraced by the masses, serves to maintain the privileged status of those in control. In the sense I use the term "ideology" in the text, it relates to everyone, wherever she or he is located with respect to the seat of power.

<sup>139</sup> H. ABRAHAM, *supra* note 22, at 157 (illustrating the way in which candidates' ideology has historically played the most decisive role in the selection of federal judges); Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 WIS. L. REV. 186, 206 (commenting on the significance of ideological considerations in the appointment of federal judges in the Eisenhower and Kennedy administrations).

<sup>140</sup> Cf. Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 327 (1985) (describing President Reagan's effort to shift the ideological balance of the lower federal courts through the appointment of more conservative judges); Note, *supra* note 12 (suggesting that President Reagan's centralized control of judicial screening procedures enabled him to identify and nominate those candidates with the most conservative ideologies); Wicker, *Straight Talk on Bork*, N.Y. Times, Aug. 13, 1987, at A31, col. 3 (insisting that both the president and Senate can be expected to take political positions respecting nominations to the Supreme Court).

<sup>141</sup> See Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ. ST. L.J. 211; cf. Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 348 (1981) (demonstrating that candidates' party affiliation has consistently been an essential criterion in the appointment process).

<sup>142</sup> Thus ideological considerations cannot justify the refusal to consider Catholics for the bench. See *supra* Part IV(A); cf. U.S. CONST. art. VI, § 3 (barring a "religious Test" as a qualification for an office of the United States). The distinction I mean to draw between ideology that *may* be taken into account by appointive authorities, and thus *may* be the basis for rejecting candidates, and ideology that *must* be considered disqualifying constitutionally is not so clean as it may first appear. Whenever a governor limits choice to members of his or her own party, something I concede *may*

stantive constitutional standards I have suggested here are not offended by the mere application of politics to the business of choosing judges. It is quite plain, then, that appointive authorities may and should reject candidates on ideological grounds.

The question whether such authorities *must* jettison some candidates because of those candidates' perspectives on the world is more troublesome. Some ideological positions disable candidates from service on the bench in this constitutional democracy. The appointment of judges who hold those views is therefore unconstitutional. I do not propose for a moment that this constitutional prohibition tracks even roughly the path of permissible grounds for rejecting candidates; far from it.<sup>143</sup> The Constitution bars the door only to judicial candidates whose ideology is at war with constitutional democracy as we know it, as it has been developed, understood, and valued in this political culture. The elements of that constitutional democracy can be stated clearly, if they can be applied only with difficulty. Governmental officers may not simply and selfishly advance the preferences of privileged groups—even majorities—but rather must choose objectives for action in the public interest. They must recognize the right of all citizens to be treated as equals and thus must fashion policies with attention to the interests, aspirations, and integrity of all. This is especially true with respect to choosing the judges who are assigned the duty to enforce the Constitution on a daily basis. Candidates who manifest disrespect for the equality of others must, then, be rejected.

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be done, it may be argued that candidates from an opposing party (and other citizens who do not share the governor's party preference) are denied equal concern and respect. See *Davis v. Bandemer*, 478 U.S. 109, 132-34 (1986) (wrestling with a political gerrymandering claim); Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1326 (1987) (commenting on the decision in *Davis* to adjudicate claims of partisan gerrymandering). The arid distinction between affirmative preference and negative mistreatment cannot withstand scrutiny at the fringes and disintegrates entirely when the burdens assumed by the disfavored become paramount, as in my hypothetical regarding Catholics. Even if the relationship between permissible political considerations and constitutionally proscribed procedures for judicial selection remains troubled, my analysis of constitutionally mandated substantive criteria for judicial selection can stand on its own. See *supra* note 110.

<sup>143</sup> Cf. LAW'S EMPIRE, *supra* note 8, at 87 (contemplating that judges may legitimately disagree over the use to which the intentions of legislative drafters should be put). While Ronald Dworkin opposed confirmation of Judge Bork because of Bork's originalist position and disrespect for precedent, Dworkin did not put his arguments in constitutional terms. See Dworkin, *The Bork Nomination*, N.Y. Review of Books, Aug. 13, 1987, at 3, col. 1 (labeling Bork's style of decisionmaking radical and antilegal). Dworkin, however, did interpret Bork's defeat as a vindication of his own competing understanding of constitutionalism. Dworkin, *From Bork to Kennedy*, N.Y. Review of Books, Dec. 17, 1987, at 36, col. 2.

## V. IMPLEMENTATION MECHANISMS

I come at last to the practical problem of enforcement, which no doubt also contributes to our reluctance to recognize constitutional standards for judicial selection. Lawyers may think immediately of judicial enforcement and may balk at asking judges to police the way in which they themselves are chosen. Sitting judges, moreover, may reasonably hesitate to pass judgment on potential colleagues. If those hurdles are cleared, there will be other problems: standing, ripeness, and appropriate relief. Judges' own doubts about their role will, of course, influence the way in which these issues are resolved. Then, too, the specter of self-appointed private attorneys general haling appointive authorities into court to account for unpopular selections is more than most lawyers, or legal academics, can contemplate with comfort.<sup>144</sup>

I do not discount the gravity of these problems, though it bears mention that the corpus of technical rules governing the justiciability of constitutional questions in article III courts is hardly something to boast about.<sup>145</sup> Rather than projecting the kinds of concrete lawsuits that might be structured, I want to explore the capacity of executive and legislative officers to fashion other mechanisms to ensure that constitutional standards for judicial selection are met. To begin, the president and the various governors, who often have authority to nominate or appoint judges, may simply respond to their responsibility to enforce the Constitution by establishing appropriate procedures for identifying candidates and excluding from consideration candidates whose ideology renders them ineligible for judicial service. President Carter's nominating commission was a fair start in the federal system; similar schemes in place in many states are equally promising.<sup>146</sup> Executive officers are sworn to uphold the Constitution and would do so in most instances if relevant standards were agreed upon. While, again, we typically look to judicial opinions in actual cases for authoritative guidance regarding constitutional standards, there are other arenas in which the Constitution's meaning must be articulated. If this were not so, we could make no sense at

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<sup>144</sup> See, e.g., *Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (refusing to adjudicate a challenge to Justice Black's appointment to the Supreme Court).

<sup>145</sup> See Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) (arguing that the law of standing lacks a rational foundation); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) (suggesting that the Supreme Court continually "misuses" the doctrines of standing and equitable restraint).

<sup>146</sup> See L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1980) (providing illustrations). Such nominating mechanisms can also produce names from constitutionally distinctive groups. See Part IV(A).

all of widely-recognized phenomena that rarely receive explicit judicial elaboration.<sup>147</sup>

In addition to policing themselves, executive officers may enforce constitutional standards in their dealings with other participants in the appointment process. For example, the president can and, if the Constitution is to be respected, must refuse to nominate candidates recommended by senators if the names of those candidates were generated by inadequate procedure. A resolute president, indeed, might force senators to develop their own nominating commissions in order to satisfy constitutional demands and thus to win presidential cooperation.<sup>148</sup> Stalemate is possible, of course, but powerful incentives to arrive at agreement make accommodations consistent with the Constitution irresistible in most instances.

The possibilities for legislative enforcement are, if anything, more abundant.<sup>149</sup> First, legislative bodies assigned by law to pass on nominees put forward by the executive can refuse to approve any candidate chosen by a

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<sup>147</sup> Executive privilege, for example. See Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974) (discussing the historical development of the privilege without Supreme Court approval); cf. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974) (suggesting that the privilege has no foundation in the Constitution). But cf. *United States v. Nixon*, 22 UCLA L. REV. 1 (1974) (exploring the impact of the Nixon tapes decision).

<sup>148</sup> Some senators already employ screening commissions that could serve this purpose. See A. NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES* 65 (1981). President Carter encouraged nominating panels for district court appointments, and many senators who responded favorably maintained such panels even after President Reagan rejected the nominating commission idea out of hand in favor of a more traditional selection process managed by the Justice Department. See Note, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299, 342 (1983) (disclosing that some senators nevertheless continued to employ nominating commissions). But cf. S. SUITTS, *THE APPOINTMENT OF SOUTHERN FEDERAL JUDGES: A STATUS REPORT* (1979) (reporting disappointing results from district court nominating commissions established by some Southern senators under pressure from the Carter White House).

<sup>149</sup> Cf. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (underscoring the obligation of legislatures to determine the constitutionality of proposed legislation); Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707 (1985) (discussing the competence of Congress to play a role in shaping the meaning of the Constitution). Indeed, there is reason to think that legislative bodies are positioned to give constitutional principles more complete vindication than are courts, which, for a variety of institutional reasons, may tend to check the reach of those standards. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (describing the Supreme Court's failure to enforce constitutional provisions to their fullest extent).



constitutionally inadequate process or embracing ideological commitments inconsistent with constitutional democracy. Again, the Senate provides an illustration. To be sure, Hamilton warned that senators who reject a presidential nominee for the Supreme Court must anticipate another candidate of similar bent.<sup>150</sup> It is possible that the selection process could degenerate, with a series of candidates suffering rejection *seriatim*. Still, if the Senate is adamant, as it must be where the Constitution is concerned, the president will at some point relent and put forward a nominee chosen by constitutionally acceptable means and holding constitutionally acceptable views.<sup>151</sup>

It may be objected that the Senate's attempts to influence executive choice in the federal system would run afoul of the separation of powers or the appointments clause. The separation-of-powers principle is said to be implicit in the constitutional structure (which confers primary responsibility for the three functions of government upon three different branches) or explicit in the specific assignment of functions to identified officials and bodies. Thus it has been insisted that article II's injunction that the "executive Power shall be vested in a President" squarely prohibits the appointment of federal officers (conceived as an intrinsically executive function) by anyone other than the president or his linear agents.<sup>152</sup> Yet neither the overarching separation-of-powers idea nor the language of article II mandates any such formalism. Modern appraisals of constitutional structure and

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<sup>150</sup> THE FEDERALIST NO. 76 (A. Hamilton). Recent experience indicates otherwise. Disappointed that his first choice to succeed Justice Powell could not be confirmed by the Senate, President Reagan initially insisted that he would propose another candidate equally objectionable to his critics. See *Reagan Vows New Appointment as Upsetting to His Foes as Bork's*, N.Y. Times, Oct. 14, 1987, at A1, col. 3. In due course, however, Reagan nominated Judge Kennedy, whom most observers considered to be manifestly less controversial.

<sup>151</sup> See *Bork Nomination to Court Weighed by the President*, N.Y. Times, June 30, 1987, at A1, col. 1 (reporting that President Reagan's advisors sought informal advice from senators regarding the likelihood that Judge Bork would be confirmed if nominated); *White House Floats a Dozen Names for the High Court*, N.Y. Times, July 1, 1987, at A16, col. 4 (reporting that White House officials presented a list of possible candidates to Senate leaders to determine whether potential nominees were objectionable).

<sup>152</sup> See, e.g., Brief for the United States at 9-10, 44-46, *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (amicus curiae supporting appellees) (pertaining to the appointment of an independent counsel); cf. *Springer v. Government of the Phillipine Islands*, 277 U.S. 189 (1928) (involving statutory construction but generally considered to have constitutional overtones). For a contemporaneous criticism of *Springer*, see Note, *Power of Appointments to Public Office Under the Federal Constitution*, 42 HARV. L. REV. 426 (1928) (contending that the question whether the appointive power is exclusively for the executive is sufficiently doubtful to counsel deference to congressional judgment).

language fully contemplate that other branches may play a significant, even determinative, role in the selection of even executive officers.<sup>153</sup>

With respect to the selection of Supreme Court justices, moreover, the appointments clause explicitly gives the Senate a veto.<sup>154</sup> By the literal language of the appointments clause as it has always been understood, the president simply *has* no constitutional power to make Supreme Court appointments without the consent of the Senate, which may withhold that consent until satisfied that an appointment should be made.<sup>155</sup> Any argument that seeks to fix standards for the veto, apart from the constitutional standards the Senate respects by exercising it, degenerates quickly into the threadbare complaint that the Senate's role is merely to rubber stamp the president's choices.<sup>156</sup>

A different question would arise if the Senate were to specify an affirmative plan by which the president must select nominees and were to force cooperation by refusing to approve candidates selected in any other way.<sup>157</sup> Granted, such a scheme would seem, at first, to invade the executive's

<sup>153</sup> See, e.g., *Morrison v. Olson*, 108 S. Ct. 2597, 2621 (1988) (refusing to embrace any wooden rule that the president or his designees enjoy absolute power to appoint officers that perform purely executive functions). The *removal* of executive officers presents its own peculiar issues. See *Myers v. United States*, 272 U.S. 52, 161 (1926) (invalidating an attempt by Congress to advise and consent with respect to the removal of officials performing executive duties); Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 394 (1927) (criticizing *Myers* for failing to allow Congress an authoritative role in the removal of executive officers and thereby creating strife between the legislative and executive branches).

<sup>154</sup> U.S. CONST. art. II, § 2, cl. 2 (the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States").

<sup>155</sup> See *supra* Part I; see also Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1206 (1988) (explaining that the Senate is under "no affirmative constitutional compulsion to confirm" presidential nominees).

<sup>156</sup> Of course, Congress can authorize the president to appoint "inferior Officers." But in that event the president's power flows from statute, not from article II. Inasmuch as it is the Senate, apart from the full Congress, whose advice and consent the president must seek, there is no constitutional requirement of bicameralism or presentment. *INS v. Chadha*, 462 U.S. 919, 955 (1983) (noting that the "Senate alone" enjoys "final unreviewable power to approve or to disapprove presidential appointments").

<sup>157</sup> Senator Hugh Scott of Pennsylvania once proposed legislation establishing a nominating commission, the members of which were to be appointed by the president, to generate the names of candidates for both the Supreme Court and the lower federal courts. Scott, *The Selection of Federal Judges: The Independent Commission Approach*, in JUDICIAL SELECTION, *supra* note 36, at 197.

threshold authority to nominate candidates.<sup>158</sup> Yet inasmuch as the president would retain power to employ processes above the constitutional floor and to select from among a range of acceptable candidates, such a plan would not substantively undercut the president's authority to select nominees. Certainly, such a scheme would be no more troubling than the "blue slip" system, by which individual senators effectively become the nominating authorities with respect to some lower federal court appointments.<sup>159</sup>

Finally, legislatures can often reformulate the judicial selection scheme to ensure respect for constitutional standards. An attempt by Congress to accomplish change in the federal system would elicit some threshold concern. For whatever reason, the Constitutional Convention decided to keep the House of Representatives out of the business of choosing most federal officers.<sup>160</sup> And attempts by the full Congress to assume, or to delegate, appointive power forthrightly have been unsuccessful.<sup>161</sup> At the same time, Congress has power to determine the size of the Supreme Court, to fix its terms, and to make "exceptions" and "regulations" with respect to the Court's appellate jurisdiction.<sup>162</sup> The very existence of the lower federal courts may depend upon congressional will, and, certainly, the jurisdiction of those courts is open to congressional adjustment of at least some sort.<sup>163</sup> It

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<sup>158</sup> Cf. *Myers v. United States*, 272 U.S. 52, 234 (1926) (Brandeis, J., dissenting) (insisting that "[t]here is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices").

<sup>159</sup> The Senate has long maintained the practice of permitting individual senators to veto presidential nominees by refusing to return a form, called a "blue slip." See Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 JUDICATURE 60, 63 (1980) (explaining that the blue slip procedure creates a kind of pocket veto for home state senators).

<sup>160</sup> The reason may have been only to assign appointive authority to a body small enough to perform effectively. See *supra* notes 18-19 and accompanying text.

<sup>161</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 120-39 (1976) (holding that the appointment of members of the Federal Election Commission by the President of the Senate and the Speaker of the House violated the appointments clause).

<sup>162</sup> U.S. CONST. art. III, § 2, cl. 2. See generally *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893, 901 (1982) (treating Congress's authority regarding the Supreme Court's appellate jurisdiction).

<sup>163</sup> U.S. CONST. art. III, § 1. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850) (holding that Congress need not confer the fullest constitutional jurisdiction upon inferior courts of its own creation). See generally Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 920 (1984) (concluding that article III allows Congress broad discretion to distribute federal question litigation between the state and federal courts); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 51 (1975) (contending that congressional power over lower federal court jurisdiction is limited by the due process clause of the fifth amendment only in certain circum-

follows, one should think, that Congress can specify qualifications for federal judgeships.<sup>164</sup> Inasmuch as abstract selection standards in this field tend necessarily to be ambiguous, Congress may find it difficult effectively to restrain the president by the mere statement of formal requirements. Still, the articulation of constitutional aspirations can have its beneficial effects. If Congress can and does require that bankruptcy judgeships be filled by candidates chosen "without regard to race, color, sex, religion, or national origin" and possessing a "demonstrated commitment to equal justice under law," then it seems that Congress can and should specify similar standards for article III judges.<sup>165</sup>

In the case of the lower federal courts, moreover, Congress need not settle for a selection scheme that mirrors the plan established by the appointments clause for Supreme Court justices. A presidential nomination coupled with senatorial advice and consent is explicitly mandated only for the selection of what the Court has called "principal" officers, i.e., "Ambassadors," "other public Ministers and Consuls," and "Judges of the supreme Court."<sup>166</sup> Federal judges assigned to the district and circuit courts plainly fit none of those three categories. The possibility that they may be "other public Ministers" is demolished by the very next subdivision of article II, according to which the president is to "receive *Ambassadors* and *other public*

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stances). *But see* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 272 (1985) (insisting that Congress must vest federal question jurisdiction in some federal court); Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 754 (1984) (providing historical support for a theory of mandatory federal jurisdiction); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 21-22 (1981) (also arguing that there are limits to congressional authority); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (similarly claiming structural constraints).

<sup>164</sup> Cf. Note, *Congressional Power Under the Appointments Clause After Buckley v. Valeo*, 75 MICH. L. REV. 627, 640-48 (1977) (contending that Congress can establish qualifications for federal executive officers to be appointed by the president).

<sup>165</sup> See 28 U.S.C. § 152 (1984), amended by 28 U.S.C. § 152 (Supp. IV 1986); see also 19 U.S.C. § 1330(a) (1982) (providing that no more than three commissioners appointed by the president to the International Trade Commission can be members of the same political party).

<sup>166</sup> U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (stating that "[p]rincipal officers are selected by the President with the advice and consent of the Senate"). All "Officers of the United States" whose selection is *not* expressly assigned to the president with the "Advice and Consent" of the Senate are "inferior Officers." See *Morrison v. Olson*, 108 S. Ct. 2597, 2608 (1988) (recognizing that the line between inferior and principal officers "is one that is far from clear" but suggesting no further subdivisions within those constitutional categories).

*Ministers.*"<sup>167</sup> The conjunction of "other public Ministers" with "Ambassadors" in a provision clearly contemplating representatives of foreign governments is strong evidence that such "other public Ministers" are officers with authority for foreign affairs.

The presidential nomination/senatorial advice-and-consent scheme may also be employed in the selection of "all other Officers of the United States, whose Appointments are not herein otherwise provided for."<sup>168</sup> But as to "such inferior Officers," the Congress may choose to establish an alternative means. Inasmuch as there is no special provision in the Constitution for the selection of lower court judges, they would seem to be officers whose appointments are *not* "herein otherwise provided for."<sup>169</sup> Accordingly, they must be "inferior Officers" who may be chosen by means other than presidential nomination with senatorial advice and consent. This result is to be expected, of course, inasmuch as the Convention, by common account, finally reconciled disagreements over the establishment of federal courts apart from the Supreme Court by leaving the choice to Congress.<sup>170</sup>

At least those whose tastes in constitutional interpretation run to intricate examinations of text should be persuaded that this process of elimination leads to the conclusion that lower court judges are "inferior Officers." The proviso in the appointments clause following the colon after the term "Law" and including the phrase "such inferior Officers" must relate to the immediately preceding category of officers, i.e., "other Officers of the United States" (including lower court judges). The only alternative is to read the proviso to relate to all four categories of officers mentioned in the preceding sentence—"Ambassadors," "other public Ministers and Consuls," "Judges of the supreme Court," and "all other Officers of the United States." That interpretation would conflate "principal" and "inferior" federal officers. Certainly "Judges of the supreme Court" cannot be "such

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<sup>167</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>168</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>169</sup> The "Officers of the United States" whose appointments *are* "herein otherwise provided for" would seem to be the president and vice president, the members of the House and Senate and the constitutionally prescribed officers in each, officers of the state militia, and the members of the electoral college—all of whom are selected by means specified elsewhere in the Constitution. U.S. CONST. art. II, § 1 (providing for the election of the president, vice president and the members of the electoral college); U.S. CONST. art. I, §§ 2-3 (providing for the election of representatives and senators); U.S. CONST. amend. XVII (providing for the election of senators); U.S. CONST. art. I, § 8, cl. 16 (reserving to the states the appointment of officers of the state militia).

<sup>170</sup> See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 10-11 (3d ed. 1988) (discussing the compromise); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970) (endorsing the compromise account).

inferior Officers'' that Congress can establish an alternative mechanism for their appointment.<sup>171</sup>

Lower court judges, then, *may* be selected after the fashion of Supreme Court justices. If, however, Congress prefers to depart from that scheme, perhaps in furtherance of constitutional standards, the appointment of district and circuit judges may be vested in the ''President alone, in the Courts of Law, or in the Heads of Departments.'' I lay aside the first possibility and partake of the second only as it may be combined with the third.<sup>172</sup>

One way in which Congress may inject constitutional standards into the judicial selection process is to establish an administrative agency, within an existing department of the national government or as a new entity created for the purpose.<sup>173</sup> Subject to presidential veto and the process of accommodation such a veto would inspire, Congress is free, for example, to establish a Department of Judicial Selection, whose ''Head'' can be empowered to appoint federal judges pursuant to constitutionally required procedures and substantive criteria. In order to safeguard this ''Head'' from the president,

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<sup>171</sup> The Supreme Court's reasons for concluding that independent counsels appointed under the Ethics in Government Act are ''inferior Officers'' throw but little light upon the issue here. *See Morrison v. Olson*, 108 S. Ct. 2597 (1988). To be sure, there is little to compare between such special prosecutors and lower federal court judges. Where independent counsels are removable (for cause) by the attorney general, federal judges may be removed only by impeachment. Where independent counsels have limited duties and must adhere to Justice Department policies, federal judges exercise a wide jurisdiction and need conform only to their own sense of federal law—subject to review in the Supreme Court. And where independent counsels serve for limited periods, federal judges hold office during good behavior. Yet none of those considerations, developed ad hoc for purposes of the necessary decision at hand, was offered as determinative of the ''inferior Officer'' question in other contexts. In the end, the Court's majority plainly and deliberately withheld any thoroughgoing definition of ''inferior Officers'' that would have anticipated congressional action touching lower federal court judges. While the Court might yet place lower court judges in the ''principal'' category if Congress were to treat them otherwise, any such decision would have to rest on policy considerations apart from the appointments clause—which, on the construction offered in the text, easily admits them to the status of ''inferior Officers.''

<sup>172</sup> For an argument that the appointment of lower federal court judges should be assigned routinely to the judicial branch, see Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 488-92 (1930).

<sup>173</sup> The Justice Department would be the obvious choice, but in recent years that department has come under such criticism for subordinating the health of the federal judiciary to the sitting president's ideological whims that the Congress may prudently prefer to begin anew with an independent entity. *See generally* Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324 (1987) (suggesting that Justice Department officials in the Reagan years focused on candidates' ''general philosophy'' rather than their experience or other credentials).

whose power the new scheme is calculated to check, his or her appointment may be assigned to the judicial branch—to the Supreme Court, perhaps, or the Judicial Conference of the United States, or some specially constituted judicial body.

An arrangement of this kind would evoke counterarguments—none of them compelling. To begin, we can immediately dispose of any contention that the establishment of such a new department would constitute an attempt by Congress to aggrandize itself as against the other two branches. So long as Congress assigns appointive authority to the department head and plainly seeks no appointive role for itself or its members, the appointments clause is satisfied.<sup>174</sup> We may also dismiss a second well-worn argument: that Congress's power to assign appointive authority to the president alone, the courts, or "Heads of Departments" contemplates that inferior federal officers can be appointed only by authorities in the branches to which they "most appropriately" belong. Even assuming that the head of a new Department of Judicial Selection would be an executive officer of some stripe, there is very simply no constitutional impediment to interbranch appointments.<sup>175</sup>

More serious constitutional difficulty would be encountered, however, if Congress were to surrender only partial authority for the appointment of the department head to a judicial body and were to attempt to retain some role for itself. It comes to mind, for example, that Congress might empower the Supreme Court only to nominate candidates to head the new agency, subject to Senate approval—effectively substituting the Court for the president in this context. A scheme of that nature would raise an article III issue, inasmuch as it would arguably assign to the Court a piece of business as to which its decisions would not be final.<sup>176</sup> Yet the conventional understanding that the federal courts can be asked only to make *final* judgments fits this

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<sup>174</sup> See *Buckley v. Valeo*, 424 U.S. 1, 134-35 (1976) (holding that Congress cannot make specific appointments).

<sup>175</sup> The argument against interbranch appointments was apparently credited in *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839) (stating in dictum that "[t]he appointing power here designated [in art. II, § 2] . . . was no doubt intended to be exercised by the department of the government to which the officers to be appointed most appropriately belonged"). But the Court flatly rejected it in *Ex parte Siebold*, 100 U.S. 371, 397 (1879):

It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.

*Accord Morrison v. Olson*, 108 S. Ct. 2597, 2610 (1988) (recognizing that Congress can determine whether it is "proper" to create an interbranch appointment).

<sup>176</sup> See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (suggesting that judicial decisions cannot be subject to legislative or executive revision).

case only roughly. The underlying value at stake is the preservation of the courts for decisions that have to be made and the avoidance of advisory opinions. Here, it is essential that someone be nominated for a critical federal post, wholly apart from that person's later appointment (or rejection) by another federal authority—in this instance the Congress. At least, it is vital to note, the judicial choice of a *nominee* is final and is thus distinguishable from the kinds of preliminary judgments, subject to executive override, that presumably would violate article III. There is more than formalism between a nomination that may or may not lead to an independent appointment and a finding subject to explicit rejection by an administrative officer.<sup>177</sup>

Finally, I am afraid insurmountable constitutional impediments would lie in Congress's path if the department head (however she or he is selected) were given the task of nominating judicial candidates, subject to the advice and consent of the Senate or the full Congress. Given the precedents now on the books, it appears that Congress is unable *both* to assign selection authority to an agency *and* to retain a veto.<sup>178</sup> Certainly I would not suggest, in line with ill-advised currents elsewhere in federal law, that the "greater" power to assign appointive power to a department head includes the "lesser" power to accord such an administrative officer some intermediate role, reserving ultimate selection authority for the Congress or one of its bodies.<sup>179</sup>

I hasten to make clear that I do not recommend that a Department of Judicial Selection be established. I mean by this exercise only to point out that the status quo can be altered to gain respect for constitutional standards. As the possibilities I have mentioned demonstrate, there *are* ways in which the legislative branch can act, or threaten to act, to ensure that the Constitution is enforced in this context. Latent powers such as these add to the rich

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<sup>177</sup> In *Hayburn's Case*, for example, the federal court findings regarding pension claims were examined by the Secretary of War, who had discretion to adopt or reject them. *Id.* at 413.

<sup>178</sup> Cf. *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (invalidating a "one house legislative veto" for want of both bicameralism and presentment). For a general review of congressional attempts to affect the executive function, see Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

<sup>179</sup> See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850) (apparently holding that Congress's "greater" power to establish lower federal courts includes the "lesser" power to define those courts' jurisdiction); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982) (crediting the contention that Congress's "greater" power to leave adjudication of "public rights" to nonjudicial authorities includes the "lesser" power to confer jurisdiction of such claims on legislative courts); cf. *Buckley v. Valeo*, 424 U.S. 1, 131 (1976) (apparently rejecting this reasoning in the appointments clause context).



mix of political intrigue that, in the end, may produce a constitutionally acceptable judicial selection scheme.<sup>180</sup>

Turning to the selection of state judges, both local legislatures and the Congress can enact legislation prescribing procedures and substantive criteria. Subject to state constitutional provisions, state legislatures can alter existing arrangements by the exercise of their police power.<sup>181</sup> Congress enjoys a potentially expansive authority to legislate for the enforcement of the fourteenth amendment, wherein the constitutional standards I have explored may find a suitable textual basis.<sup>182</sup> We have done with the notion that state autonomy poses a serious, judicially enforceable barrier to congressional action—even with regard to something so close to the core as the means by which states choose the judges who interpret state law.<sup>183</sup> Indeed, it seems plain that Congress can override state constitutional law and eliminate judicial selection schemes, including popular elections, that offer insufficient assurances that federal standards will be met. Moreover, legislatures, at either the state or national level, can lay the groundwork for judicial enforcement of the Constitution within the selection schemes they themselves devise.

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<sup>180</sup> See, e.g., Pitts & Vinson, *Breaking Down Barriers to the Federal Bench: Reshaping the Judicial Selection Process*, 2 HARV. BLACKLETTER J. 27, 27-28 (1985) (proposing an "executive compact" for the purpose of increasing the number of African Americans on the federal *district* bench to a level proportionate to the share of blacks in the national population).

<sup>181</sup> See Mechem, *The Power to Appoint to Office: Its Location and Limits*, 1 MICH. L. REV. 531, 556 (1903) (explaining that state legislatures typically have substantial leeway in creating offices and appointing officers).

<sup>182</sup> U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); see, e.g., *Rome v. United States*, 446 U.S. 156, 179 (1980) (indicating that the power to enforce the Civil War Amendments "by appropriate legislation" overrides federalism); *Oregon v. Mitchell*, 400 U.S. 112, 143 (1970) (holding that discretion in the manner of "enforcement" under section five of the fourteenth amendment is left to Congress); see Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966) (insisting that Congress has enormous power under this heading to enact legislation "promoting human rights"). On Congress's power to prescribe standards above the constitutional floor identified in judicial decisions, see Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986).

<sup>183</sup> *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 554 (1985) (upholding the congressional commerce clause power to legislate with respect to the states); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (approving an even more expansive power under the fourteenth amendment).

## CONCLUSION

In an age in which constitutional theory claims a resurging share of attention in legal scholarship, and in which the business of choosing judges to develop that theory commands the headlines, the intersection between the two tends to be slighted, even ignored. I have attempted in this essay to explore the reasons for our collective reticence regarding the Constitution and the selection of judges, to identify constitutional standards applicable to judicial selection, and to speculate on the way in which such standards might be given effect by executive and legislative means. I will count myself successful if I have persuaded at least some readers that the selection of judges *can* be subjected to settled restraints attending governmental action and disabused others of the crude notion that legal standards are worthy of attention only if they can be enforced through conventional litigation in the courts. At all events, I mean to insist that the constitutional democracy in which we live depends for survival upon our commitment to choosing executive, legislative, and *judicial* officers in a constitutional, that is to say democratic, fashion.